STATE OF CALIFORNIA

BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

INQUIRY CONCERNING
JUDGE PETER J. McBRIEN,
v.

No. 185

FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE SPECIAL MASTERS

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INQUIRY CONCERNING JUDGE PETER J. MCBRIEN, No. 185

FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE SPECIAL MASTERS

The Commission on Judicial Performance (the Commission or the CJP) charged Sacramento Superior Court Judge Peter J. McBrien (Judge McBrien) with one count (consisting of multiple subparts) of willful misconduct in office, persistent failure or inability to perform his duties, conduct prejudicial to the administration of justice that brings the judicial office into disrepute, and improper action within the meaning of article VI, section 18 of the California Constitution. The Chief Justice of the California Supreme Court appointed us, as special masters, to hear and take evidence in this matter. We presided over a hearing of the charges, and submit this final report containing findings of fact and conclusions of law in accordance with rule 129(c) of the Rules of the Commission.

SUMMARY OF CHARGES

The notice of formal proceedings charged Judge McBrien as follows:

Count I(A)(1)—Judge McBrien violated the Code of Judicial Ethics, canons 2A and 3B(7), by abandoning and terminating a trial in a contested marital dissolution matter in the middle of a party's case-in-chief, without giving that party the opportunity to complete the presentation of evidence or offer rebuttal evidence, and denied that party his constitutional right to due process and a fair trial.

Count I(A)(2)—Judge McBrien violated the Code of Judicial Ethics, canons 2 and 3B(4) by threatening the attorney for that same party in the marital dissolution action with contempt if that party asserted his Fifth Amendment rights and declined to produce documents that were not relevant to the pending matter.

Count I(A)(3)—Judge McBrien violated the Code of Judicial Ethics, canons 2 and 3E(2) by engaging in embroilment in that same marital dissolution case when he ordered

his courtroom clerk to ask the court reporter to prepare a partial transcript of certain proceedings, sent that transcript to the party's employer, and notified the employer that the party failed to disclose certain information on his Statement of Economic Interest, without notifying the parties about these actions and continuing to preside over the dissolution matter.

Count I(A)(4)—Judge McBrien violated the Code of Judicial Ethics, canons 2 and 3B(4) by being discourteous to the party's attorney in that same marital dissolution matter, and addressing the attorney in a derogatory manner while she was examining a witness.

APPLICABLE CANONS

Canon 2

A Judge Shall Avoid Impropriety and the Appearance of Impropriety in All of the Judge's Activities.

A. Promoting Public Confidence

A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

Canon 3

A Judge Shall Perform the Duties of Judicial Office Impartially and Diligently.

B. Adjudicative Responsibilities

(4) A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers and of all court staff and personnel under the judge's direction and control.

(7) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, full right to be heard according to law. A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding, except as follows:

(a) A judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.

(b) A judge may consult with court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities or with other judges.

(c) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the judge.

(d) A judge may initiate ex parte communications, where circumstances require, for scheduling, administrative purposes, or emergencies that do not deal with substantive matters provided:

(i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and

(ii) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond.

(e) A judge may initiate or consider any ex parte communication when expressly authorized by law to do so.

E. Disqualification

(2) In all trial court proceedings, a judge shall disclose on the record information that is reasonably relevant to the question of disqualification under Code of Civil Procedure section 170.1, even if the judge believes there is no actual basis for disqualification.

STANDARDS FOR IMPOSITION OF DISCIPLINE

A judge may be disciplined for willful misconduct in office, persistent failure or inability to perform judicial duties, conduct prejudicial to the administration of justice that brings the judicial office into disrepute, or engaging in improper action or dereliction

of duty. The discipline that may be imposed consists of public or private admonishment, censure, or removal from office. (Cal. Const., art. VI, § 18, subd. (d)(2) & (3); *Broadman v. Commission on Judicial Performance* (1998) 18 Cal.4th 1079, 1087 (*Broadman*); *Oberholzer v. Commission on Judicial Performance* (1999) 20 Cal.4th 371, 384 (*Oberholzer*).)

The most serious constitutional basis for discipline is "willful misconduct in office," which may result in censure or removal. (Cal. Const., art. VI, § 18, subd. (d)(2); *Geiler v. Commission on Judicial Qualifications* (1973) 10 Cal.3d 270, 283-284 (*Geiler*).) To commit willful misconduct in office, a judge must (1) engage in conduct that is unjudicial and (2) committed in bad faith, (3) while acting in a judicial capacity. (*Dodds v. Commission on Judicial Performance* (1995) 12 Cal.4th 163, 172 (*Dodds*); *Broadman*, *supra*, 18 Cal.4th at p. 1091.)

> "First, in order to determine whether a judge's conduct is 'unjudicial,' we measure that conduct with reference to the California Code of Judicial Conduct. [Citations.] Second, by 'bad faith' we mean that the judge 'intentionally committed acts which he knew or should have known were beyond his lawful power' [citation] or 'acts within the lawful power of a judge which nevertheless [were] committed ... for any purpose other than the faithful discharge of judicial duties' [citations]. Third, a judge is 'acting in his judicial capacity,' when he is performing one of his 'judicial functions,' i.e., one of the varied functions generally associated with his position as a judge, whether adjudicative or administrative in nature. [Citation.] In determining whether a judge acted in his judicial capacity, we give due weight to the location of the judge's conduct. [Citation.] Thus, when a judge is on the bench, he is presumptively acting in a judicial capacity. [Citation.] Similarly, when a judge is in chambers during normal working hours, he is generally, though not necessarily, acting in a judicial capacity [citation]. In addition, if a judge uses, or attempts to use, his authority as a judge for improper ends, regardless of location, we consider the judge to be acting in his judicial capacity. [Citation.]" (*Dodds*, *supra*, 12 Cal.4th at p. 172.)

As applicable to willful misconduct, "[a] judge acts in bad faith only by (1) performing a judicial act for a corrupt purpose (which is any purpose other than the

faithful discharge of judicial duties), or (2) performing a judicial act with knowledge that the act is beyond the judge's lawful judicial power, or (3) performing a judicial act that exceeds the judge's lawful power with a conscious disregard for the limits of the judge's authority." (*Broadman*, *supra*, 18 Cal.4th at p. 1092.)

A judge also may be censured or removed for "conduct prejudicial to the administration of justice that brings the judicial office into disrepute . . . ." (Cal. Const., art. VI, § 18, subd. (d)(2); *Fletcher v. Commission on Judicial Performance* (1998) 19 Cal.4th 865, 878 (*Fletcher*).) Conduct prejudicial is less grave than willful misconduct, and "distinguishable from willful misconduct in that a judge's acts may constitute prejudicial conduct even if not committed in a judicial capacity, or, if committed in a judicial capacity, not committed in bad faith." (*Broadman*, *supra*, 18 Cal.4th at p. 1092; *Geiler*, *supra*, 10 Cal.3d at pp. 283-284.)

Conduct prejudicial includes "conduct which a judge undertakes in good faith but which nevertheless would appear to an objective observer to be not only unjudicial conduct but conduct prejudicial to the public esteem for the judicial office." (*Geiler*, *supra*, 10 Cal.3d at p. 284; *Broadman*, *supra*, 18 Cal.4th at p. 1092.) "[P]rejudicial conduct does not require the presence of bad faith, but may occur when a judge, though acting in good faith, engages in conduct that adversely would affect the esteem in which the judiciary is held by members of the public who become aware of the circumstances of the conduct. [Citations.]" (*Adams v. Commission on Judicial Performance* (1995) 10 Cal.4th 866, 878 (*Adams II*).)

"The provision that the conduct must be that which 'brings the judicial office into disrepute' does not require actual notoriety, but only that the conduct, if known to an objective observer, would appear to be prejudicial to public esteem for the judicial office. [Citation.]" (*Adams II, supra,* 10 Cal.4th at p. 878; *Doan v. Commission on Judicial Performance* (1995) 11 Cal.4th 294, 325 (*Doan*).) The "public esteem for the judiciary"

aspect of the conduct prejudicial is measured by an "objective observer" standard, such that the views of actual observers are sufficient, but not necessary, to establish judicial misconduct under an objective observer standard. (*Doan*, *supra*, 11 Cal.4th at pp. 324-325.) The judge's subjective intent or motivation is not a significant factor in assessing whether prejudicial misconduct has occurred under this standard. (*Adams II*, *supra*, 10 Cal.4th at p. 878.)

Conduct prejudicial also includes "wilful misconduct out of office, i.e., unjudicial conduct committed in bad faith by a judge not then acting in a judicial capacity." (*Geiler, supra,* 10 Cal.3d at p. 284, fn. 11; *Fletcher*, *supra*, 19 Cal.4th at p. 878.) "In this context, bad faith means a culpable mental state beyond mere negligence and consisting of either knowing or not caring that the conduct being undertaken is unjudicial and prejudicial to public esteem." (*Broadman*, *supra*, 18 Cal.4th at p. 1093; *Fletcher*, *supra*, 19 Cal.4th at p. 878.)

A judge may be censured or removed for "persistent failure or inability to perform the judge's duties. . . ." (Cal. Const., art. VI, § 18, subd. (d)(2).) "Persistent nonperformance of duties entails a pattern of legal or administrative omissions or inadequacies in the performance of a judge's duties. [Citation.]" (*Doan*, *supra*, 11 Cal.4th at p. 312.) Persistent nonperformance "focuses on a judge's legal and administrative competence and omissions," and does not entail any intentional disregard of judicial duties. (*McCullough v. Commission on Judicial Performance* (1989) 49 Cal.3d 186, 191; *Doan*, *supra*, 11 Cal.4th at p. 312.)

Finally, a judge may be publicly or privately admonished for having "engaged in an improper action or dereliction of duty." (Cal. Const., § 18, subd. (d)(3).) "This form of judicial discipline is imposed for a significantly lesser degree of judicial misconduct than willful misconduct in office and conduct prejudicial to the administration of justice

that brings the judiciary into disrepute." (Rothman, Cal. Judicial Conduct Handbook (2007 3d ed.) § 12.87, p. 665.)

"There are a variety of cases that deal with an improper action. Some examples of improper action include: asking a clerk to bring a file concerning a traffic ticket of a family member in the presence of family members, where the judge took no other action in regard to the matter; [and] personally returning a telephone call from a probationer who missed a court appearance and conversing with a probationer ex parte . . ." (Rothman, *supra*, § 12.74, pp. 659-660.) In *Adams II*, numerous allegations of misconduct were filed against a judge, and one instance was found to constitute improper action, based upon the judge's acceptance of dinner and loan of laptop computer from an attorney who had prevailed in a case presided upon by judge. The judge had reserved jurisdiction on issues and the matter was pending on appeal, and the lawyer was not previously a social acquaintance. The computer loan was based on their agreement to collaborate on a novel, and the judge failed to disclose the relationship in subsequent cases in which the lawyer appeared. (*Adams II*, *supra*, 10 Cal.4th at pp. 897-899.)

SUMMARY OF FINDINGS

As to count I(A)(1), we find Judge McBrien violated the Code of Judicial Ethics, canons 2A and 3(B)(7), and committed conduct prejudicial to the administration of justice that brings the judicial office into disrepute. As to count I(A)(2) we find Judge McBrien violated canons 2 and 3B(4), and committed an improper action. As to count I(A)(3), we find Judge McBrien violated canons 2 and 3E(2), and committed conduct prejudicial to the administration of justice that brings the judicial office into disrepute. As to count I(A)(4), we find Judge McBrien violated canons 2 and 3B(4), and committed an improper action.

FINDINGS OF FACT STANDARD

The clear and convincing evidence standard of proof applies to this inquiry, with the burden resting on the examiners for the Commission. (*Geiler*, *supra*, 10 Cal.3d at p. 275; *Fletcher*, *supra*, 19 Cal.4th at p. 878; *Doan*, *supra*, 11 Cal.4th at p. 313.) Clear and convincing evidence is evidence that is so clear as to leave no substantial doubt; sufficiently strong to command the unhesitating assent of every reasonable mind. (*Broadman*, *supra*, 18 Cal.4th at p. 1090, citing *In re Angelica P.* (1981) 28 Cal.3d 908, 919.) "Evidence of a charge is clear and convincing so long as there is a 'high probability' that the charge is true. [Citations.] The evidence need not establish the fact beyond a reasonable doubt." (*Broadman*, *supra*, 18 Cal.4th at p. 1090.)

INTRODUCTION TO FACTUAL FINDINGS

This matter concerns the actions of Judge McBrien in one case over a period of months. We have reviewed numerous documents, including the following: (1) the transcript of the trial presided over by Judge McBrien on March 2, 3, and 9, 2006, (2) the pleadings filed by the parties before and after the trial, (3) the pleadings filed by the Commission and Judge McBrien before the hearing held by us, (4) the discovery materials produced before the hearing, (5) the transcript of the hearing held by us on April 1, 2, and 3, 2009, (6) the statements and documents submitted to us as exhibits, (7) the opinion rendered by the Third District Court of Appeal, (8) the statements and documents from a prior matter involving Judge McBrien and the Commission submitted after the hearing, and (9) the briefs submitted by the Commission and Judge McBrien after the hearing. We heard oral arguments on May 29, 2009.

We think the best way for us to tell the reader what we found happened is to provide a narrative. The narrative will incorporate information from all that we have reviewed including the thoughts of the interested parties. When conflicts arise, we make a specific factual finding. We believe that such a complete rendering is necessary as this

matter is more nuanced and complex than reported by the media and described in the opinion of the Third District Court of Appeal.

Judge McBrien is a very experienced judge in a high-volume court. He performs well with well-prepared attorneys who have a clear grasp of the issues in their case. The frustration evident in this matter occurred when he was confronted with an attorney who was not well prepared and who did not grasp the important issues in the case. That does not excuse what occurred here.[1]

PART I
THE SYSTEM AND THE INTERESTED PARTIES

Judge McBrien

Judge Peter McBrien received his undergraduate degree from Stanford University and his law degree from the University of Southern California in 1970. He passed the bar and briefly worked in private practice in Los Angeles. He then worked in the Attorney General's Office in Sacramento for over 10 years. He next served in the Governor's Office in Sacramento for over four years in a variety of capacities, including as education advisor and criminal legal affairs advisor. He was appointed to the Sacramento County Municipal Court in 1987, and elevated to the Superior Court in 1989. He has been a judge for 22 years. (HT 29, 184-186)

Upon his elevation to Sacramento County Superior Court, Judge McBrien received a general trial assignment. In December 1989, he was assigned to the family

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[1] All references to "RT" are to the reporter's transcript for the three-day *Carlsson* trial, which occurred in March 2006. All references to "HT" are to the transcript of the three-day hearing conducted in April 2009 by the Special Masters, in the *Inquiry Concerning Judge Peter McBrien,* CJP No. 185, including the numerical and alphabetical exhibits introduced at that hearing. All references to "AT" are to the transcript of the oral argument in this matter conducted on May 29, 2009. All references to Judge McBrien's deposition are to the transcript of his December 2008 deposition. (Exhibit 5)

law division, where he has remained. (HT 29, 186) He had not practiced family law as a private practitioner. (HT 186)

The Family Law Division

When Judge McBrien began hearing family law cases, the family law division was located in the main courthouse. Since 1999, the family law division has been located in the Ridgeway Courthouse in Sacramento, a separate facility from the main courthouse.

The family law division consisted of Judge McBrien and two other judges. The three judges heard law and motion four days a week, and conducted settlement hearings on the fifth day. The family law cases that did not settle were transferred to the master calendar for trial. The family law trials, however, had a difficult time getting a courtroom as they competed with all other criminal and civil trials. (HT 186-188, 546-547)

The family law judges investigated ways to restructure the department's calendar to expedite family law trials. The judges, including Judge McBrien, formed a working group with attorneys from the Executive Committee of the Family Law Section of the Sacramento County Bar Association. The group reviewed the operations of family law divisions in other counties, and they proposed an alternate plan to handle family law cases. The proposal was presented to the Family Law Section, modifications were made, and then it was approved by the entire Superior Court in 1991. (HT 189-191, 463)

This system, which is still in use today, provides for the family law judges to hear law and motion on Mondays, Tuesdays, and Wednesdays, and conduct family law trials on Thursdays and Fridays. The attorneys for the parties in a family law case advise the court of the estimated time for trial. If the attorneys estimate a trial will be two days or less, the trial is assigned by the family law court's supervising judge to one of the judges in the family law division. If the attorneys estimate the trial will be more than two days, then the family law trial is sent to the master calendar in another building to be assigned to a superior court judge. The settlement conferences are conducted by attorneys from

the family law bar, who volunteer to sit as pro tem judges four days a week. If the trial estimate is one day or less, the settlement conference is conducted one week before the scheduled trial date. If the trial estimate is more than one day, the settlement conference is held two weeks before the scheduled trial date. (HT 189-192, 445-447, 463, 547-548)

Most family law attorneys in Sacramento County prefer to have their cases heard by the judges in the family law division, and try to avoid trial estimates of more than two days. (HT 188-189, 191-192, 446-448, 505-508) As a result, there is a constant squeeze to complete family law trials in two days to avoid sending the case to the superior court's master calendar. (HT 509) The parties frequently agree to bifurcate multiple issues into separate two-day trials, break the trial into phases, and obtain stipulations and orders so the parties can keep their trials within the family law division. (HT 509-511, 447-448) There is no legal requirement for a family law trial to be held continuously on sequential days. The court can return on other dates to finish a trial. (HT 58)

In 2006, there were four judges in the family law division. Judge McBrien was assigned to Department 124. (HT 29-30, 188, 619) He typically arrives at work around 6:30 a.m. On trial days, he works until 4:30 p.m. (HT 30) The courthouse is locked at 6:00 p.m. (HT 30) He believes he has heard 40,000 trials since joining the bench. (HT 622)

In 2006, Judge McBrien was the substitute supervising judge in the family law division, and he planned to retire in 2007. The judge who was designated to be the supervising judge was frequently away from the court teaching courses in a variety of subjects throughout the state, so she asked Judge McBrien to serve in her place when she was gone. (HT 209)

The Carlssons and the Dissolution

Ulf and Mona Carlsson married in 1987 and had one child. (Exhibit 10, p. 370; Exhibit 19, p. 539) Mrs. Carlsson was employed as an office manager at a dental office.

Mr. Carlsson was a planning manager/supervisor in the real estate services division of the State of California's Department of General Services (DGS). (Exhibit 10, pp. 370-371; Exhibit E, p. 303; RT 39, 337-338, 348)

On April 14, 2004, Mrs. Carlsson filed a petition for dissolution of marriage. (Exhibit C, p. 343) On March 18, 2005, Mr. Carlsson filed his response. (Exhibit D, p. 294)

The Attorneys

Mrs. Carlsson was represented by attorney Charlotte Keeley for the entirety of the case. Ms. Keeley practices in Sacramento and is a certified family law specialist. She has served as a judge pro tem in the family law division. Ms. Keeley is a member of the Executive Committee of the Family Law Section of the Sacramento County Bar Association, which has input in drafting the local family law court rules. Ms. Keeley has known Judge McBrien since 1990 and worked with him while she was on the Executive Committee. Ms. Keeley has appeared before Judge McBrien on many occasions and has a good working relationship with him. (HT 461-465, 479, 488)

Ms. Keeley was familiar with the family law division's procedure of conducting trials estimated at two days or less on Thursdays and Fridays. (HT 461-465, 479, 488) In her opinion it was not common for Thursday/Friday family law trials to go beyond the trial estimate. If the parties reached the end of the day, however, and someone needed another 15 or 20 minutes, the court typically gave the parties the extra time. (HT 488)

Mr. Carlsson was represented by three attorneys in 2005. In October 2005, he retained his fourth attorney, Sharon Huddle. (HT 289-290, 319, 465, 467) Ms. Huddle represented Mr. Carlsson until June 2006. She handled the trial that is at issue here. (HT 289-290)

Ms. Huddle has practiced family law in Sacramento County since 1992, and her office is in Roseville. She is not a certified family law specialist. She is not a member of

the Family Law section of the Sacramento County Bar Association and has not served on the Executive Committee. She has never served as a judge pro tem in Sacramento County. (HT 211-212, 287-290)

Ms. Huddle tries one to three dissolution cases per year in Sacramento County, and she is familiar with the family law division's procedures. She knew that trials estimated to last two days or less are heard on Thursdays and Fridays, and that family law judges typically end their day at 4:30. In her opinion it was not uncommon for trials to go beyond 4:30 p.m.; it happens half to three-fourths of the time. She did not know that trials estimated at more than two days are assigned from the master calendar at the main courthouse. (HT 212-213, 288, 305)

Ms. Huddle and Ms. Keeley had one case with each other in the 1995, when the family law division was still in the downtown courthouse. (HT 468, 575-576) Ms. Keeley described their working relationship as average and not particularly negative. (HT 469)

Mistrials in the Family Law Division

Judge McBrien believed he had the discretion to declare a mistrial if the attorneys estimated the trial will be two days or less, and the trial is not completed in that time. (HT 192-193) He believed this discretionary power derived from the culture of the family law division. (HT 623, 577) The 2006 local rules (exhibit O; HT 529-530) did not authorize a family law judge to declare a mistrial if the trial exceeded the time estimate.

Judge McBrien testified that he insisted the attorneys meet their trial estimates. (HT 206-207)

> "Well, the Bar, family law bar, volunteers their time to the Court in expectation that they're going to be able to get to trial when they set their trials. And I don't want to say it's a, as the saying goes, tit for tat, but it may well be, in their minds, something that they certainly expect of us.

> *And quite frankly, it's part of the general family law culture in Sacramento County that you're going to adhere to your estimate or you're going to make a request explaining the reasons you need more time.*" (HT 207, italics added)

Judge McBrien further testified the family law judges had discretion to threaten mistrials if the attorneys exceed their trial time estimates.

> "*We always make the threat.* It's rare to carry it out. It's preferable to bifurcate, get as much resolved in the case as possible so that the parties don't have to redo it. And they may not be able to complete everything they wanted to complete, but at least they can set it for further hearing on remaining issues." (HT 577-578, italics added)[2]

When a mistrial is declared, the parties are sent back to the family law department's trial setting calendar. (HT 575)

Judge McBrien was asked about his general response to a situation where an attorney requests additional trial time beyond that given in their two-day trial estimate.

> "First of all, I want to make sure that the other party is present, find out what their position is regarding the need for additional time. And if there appears to be a need or there's a stipulation for additional time, then we'll schedule it for a time that they can—and I would recommend that—let's say a Friday afternoon, simply because Friday cases tend not to go so long. And—but if there's another trial in progress, they would be taking the second row. I mean, they would need to basically wait for that other case to complete before they actually would get any time." (HT 197-198)

If one party requests additional time and the other party disagrees, Judge McBrien would grant the request over the opponent's objection if it appeared there was a legitimate issue that ought to be resolved. (HT 198) Judge McBrien had never granted additional trial time to a party without a request because he believed the attorneys were in

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[2] In his deposition, Judge McBrien testified that he generally used the threat of a mistrial "in an effort to try to keep the attorneys on track for the time estimates that they have made, so that I can then hear the next case on the dockets." (Exhibit 5, p. 36)

control of their cases. He did not want to be perceived as taking control of a case from an attorney. (HT 198)

If the parties requested and received additional trial time, the matter would be set at a time and date not usually given for a trial. Judge McBrien usually conducted the specially set proceedings on the lunch hours on Mondays, Tuesdays, and/or Wednesdays, or on Tuesday afternoons. (HT 620, 623)

Judge McBrien presided over the *Barrett* trial in 1995, where Ms. Keeley and Ms. Huddle represented the opposing parties. The trial was set for two days. The trial went to a third day because one or both of the parties made the request and he granted it, and the case was completed on the third day. (HT 575-576, Exhibit M)

Judge McBrien presided over the *Myles* trial in 1998 involving a very complicated child custody issue. Ms. Huddle represented the father, who was a registered sex offender, and another attorney represented the mother, who also had serious issues. The parties estimated the trial would take two days. Judge McBrien granted the parties' request for more time, but he declared a mistrial when the case was not even close to being finished after two and one-half days. (HT 573-574, 604-606; Exhibit L) This was the only occasion that Judge McBrien declared a mistrial in one of Ms. Huddle's cases. (HT 367, 369-370)

Ms. Keeley had a family law judge other than Judge McBrien declare a mistrial in one of her cases because the parties went beyond the time estimate. (HT 498)

On March 10, 2006, the day after the *Carlsson* trial ended, the Fourth District Court of Appeal published *Blumenthal v. Superior Court* (2006) 137 Cal.App.4th 672. The Court of Appeal held that a superior court judge could not declare a mistrial because the parties exceeded the trial time estimate, unless there was a court rule that notified the parties of that possibility and authorized the court to declare a mistrial on that basis. (HT 577, 578) Judge McBrien advised the family law bench about the *Blumenthal* case, and

the Family Law Section's Executive Committee was also advised. As a result of *Blumenthal*, the local rules for the family law department of the Sacramento County Superior Court were amended as of January 2008, to authorize a judge to declare a mistrial if the parties exceed their estimated trial time. (HT 577, 579, Exhibit N)

PART II
CARLSSON PRETRIAL PROCEEDINGS

Pretrial Estimate of Time for Trial

The *Carlsson* trial was initially scheduled for January 2006, but Ms. Huddle asked Ms. Keeley to continue the matter since she just had been retained by Mr. Carlsson. The parties ultimately agreed on dates in February and March 2006, for the settlement conference and two-day trial. (HT 466-468)

On December 13, 2005, Ms. Keeley, on behalf of Mrs. Carlsson, filed a memorandum to set, which stated the estimated time for *Carlsson* trial was two days, the parties agreed to the trial dates of Thursday, March 2, and Friday, March 3, 2006, and the settlement conference would be held on February 15, 2006. (Exhibit 6, pp. 294-295; Exhibit D, pp. 294-295)

On December 23, 2005, the family law trial clerk filed a notice that the mandatory settlement conference in *Carlsson* would be on February 15, 2006, and the trial was set for March 2, 2006. (Exhibit 7)

Ms. Huddle was aware of Ms. Keeley's estimate that the *Carlsson* trial would be two days. She never filed a document with a different estimate and she never indicated to the court that she disagreed with the estimate. (HT 222, 283-284, 305, 347)

Carlsson Pretrial Filings & Mr. Mayo's lawsuit

When the Carlssons separated, the community assets included the family residence on Tunnel Hill Way in Gold River (the residence), and a fourplex rental property on 24th Street in Sacramento (the fourplex). (Exhibit 8, p. 305) After the separation, Mr.

Carlsson lived in the residence by mutual agreement. (RT 55; HT 291, 292; Exhibit 8, p. 304) Mrs. Carlsson moved out of the residence and had primary physical custody of their minor child. (HT 291, 292) Mrs. Carlsson sought joint legal and sole physical custody of their child, child and spousal support, division of property, and attorney fees. (Exhibit C, pp. 343-344)

On February 2, 2006, Ms. Keeley, on behalf of Mrs. Carlsson, filed a pretrial statement of issues pursuant to the local rule that required such a statement to be filed 20 days before the settlement conference. (Exhibit 8; Exhibit E; HT 466) According to Mrs. Carlsson's pretrial statement, the parties agreed to bifurcate the child custody issue so it could be heard by a special master. (Exhibit 8, p. 303; Exhibit 20) The disputed trial issues were child and spousal support, characterization and division of property, including Mr. Carlsson's state pension, and attorney fees and costs. (Ex. 8, pp. 304-305) Mrs. Carlsson declared the residence and fourplex each had an appraised fair market value of $640,000, and requested the court to award both properties to Mr. Carlsson, subject to equalizing payments. (Exhibit 8, pp. 305, 307; HT 36, 217)

On February 14, 2006 (one day before the scheduled settlement conference (RT 213)), Joseph Mayo filed a complaint in pro per in the Sacramento County Superior Court against Mr. and Mrs. Carlsson for fraud and breach of contract. Mr. Mayo alleged that in October 2003, he signed a partnership agreement with Mr. Carlsson for a 50 percent interest in the fourplex, he invested time and money in the renovations of the building, and the Carlssons breached the agreement and refused to transfer the half interest to him. (Exhibit I) At some point, Mr. Mayo also filed a lis pendens against the fourplex, which would have clouded title if the property was sold. (HT 303, 512-513)

Ms. Huddle met Mr. Mayo at some point prior to the start of the *Carlsson* trial. He told her about his lawsuit against the Carlssons, and she told him that he had to file a joinder in the dissolution case to claim an interest in the fourplex. (HT 295, 302-303,

307) Ms. Huddle testified she did not prepare Mr. Mayo's civil complaint or his motion for joinder, and she did not know he filed the lis pendens against the fourplex. (HT 297, 302-304) Ms. Huddle moved for a continuance, however, so all the issues about Mr. Mayo's partnership interest and the joinder would be tried together in the same case. (HT 321)

On February 15, 2006, Ms. Huddle, on behalf of Mr. Carlsson, filed a pretrial statement for the settlement conference in the dissolution matter, and stated the contested issues were child custody, child and spousal support, and division of the community assets of the residence and fourplex. (Exhibit 9; Exhibit F; HT 309) Mr. Carlsson argued Mrs. Carlsson should not receive spousal support because she was underemployed. (Exhibit 9, p. 321-322; HT 293) Mr. Carlsson declared the fair market value of the residence was $500,000, and the fourplex was $600,000. He requested to receive both properties. (Exhibit F, p. 322; HT 36-37, 291-292)

Mr. Carlsson further asserted the fourplex's title was clouded by a lis pendens, which had been filed by a third party (Mr. Mayo). Mr. Carlsson argued the fourplex's title needed to be addressed before the court resolved the parties' community interests in the property. (Exhibit F, p. 322)

On February 15, 2006, the settlement conference in the *Carlsson* case was conducted by two attorneys sitting as judges pro tem. The parties did not settle any of the issues and the case remained set for trial. (HT 467-468, 313)

Also at the settlement conference, Ms. Huddle asked Ms. Keeley for a continuance of the trial dates of March 2 and 3, 2006. Ms. Keeley rejected Ms. Huddle's request because she believed Mr. Carlsson would not resolve any of the issues without a trial, and Mrs. Carlsson could not afford to delay the matter any further because she had limited financial resources.

Under the local rules, the parties have to file a statement of issues within 20 days of the trial date; if one party timely files the statement, that party may unilaterally obtain a continuance at the settlement conference. If a party does not timely file the statement, that party cannot unilaterally obtain a continuance and must obtain the other party's consent or have the court grant a motion for continuance. Since Ms. Huddle did not timely file a statement of issues, she could not unilaterally obtain a continuance at the settlement conference, and she needed Ms. Keeley's consent to continue the matter. (HT 470-471, 502-505)

On February 27, 2006, Mr. Mayo filed a motion in pro per for joinder in the *Carlsson* dissolution action and alleged that he had a 50% interest in the fourplex based on the October 2003 partnership contract executed by Mr. Carlsson. Mr. Mayo acknowledged that Mrs. Carlsson did not sign the contract, but alleged she had knowledge of and agreed to the partnership agreement. The petition for joinder was set to be heard on April 3, 2006. (Exhibit B, pp. 327-328; Exhibit C, pp. 348-358)

On March 1, 2006, one day before the scheduled start of the *Carlsson* trial, Ms. Huddle, on behalf of Mr. Carlsson, filed an ex parte motion to continue the trial. (Exhibit C, pp. 337, 367-368; HT 469-470, 315) The motion was supported by Mr. Carlsson's declaration that a continuance was necessary to allow the court to rule on Mr. Mayo's joinder motion and resolve the ownership of the fourplex prior to addressing the issues raised by the dissolution action. (Exhibit C, p. 341)

On March 1, 2006, Judge McBrien denied Mr. Carlsson's motion to continue the trial. (Exhibit C, p. 337; Exhibit K; HT 317, 572-573, 193-194)

Trial Briefs

On March 2, 2006, Ms. Keeley filed the trial brief and a declaration in support of her request for attorney fees on behalf of Mrs. Carlsson. (Exhibits 10, 11)

Mrs. Carlsson requested spousal support based on her employment as a dental office manager, where she worked 28 hours per work. The dental office was open four days a week for a total of 32 hours, and no employment was available in excess of those hours at that dental office. (Exhibit 10, p. 371) Mrs. Carlsson did not want Mr. Carlsson's pension divided into segregated accounts. (Exhibit 10, p. 376)

Mrs. Carlsson disagreed with Mr. Carlsson's valuation of the two real properties. She asserted the residence was appraised at $615,000, whereas the fourplex was appraised at $650,000. She agreed that Mr. Carlsson should receive both the residence and fourplex subject to equalizing payments. (Exhibit 10, p. 374)

Mrs. Carlsson disputed Mr. Mayo's partnership claim in the fourplex. She claimed she did not sign and never knew about the alleged partnership agreement. The agreement was never recorded, and title to the fourplex was in the name of only Mr. and Mrs. Carlsson. And, Mr. Carlsson lacked the ability to convey an interest in community property unilaterally. (Exhibit 10, pp. 374-376)

Ms. Huddle did not file a trial brief or a declaration concerning attorney fees on Mr. Carlsson's behalf. At the hearing, Ms. Huddle testified she rarely prepared trial briefs, and believed trial briefs are not submitted to the court in family law cases. (HT 327-329)

PART III
THE *CARLSSON* TRIAL

Judge McBrien presided over the *Carlsson* trial on the morning and afternoon of March 2, the morning of March 3, and the afternoon of March 9, 2006. We will examine the reporter's transcript of each trial date, supplemented by testimony and exhibits admitted at the Special Masters' hearing, including Judge McBrien's deposition in this matter.

Assignment of *Carlsson* Trial to Judge McBrien

On the morning of Thursday, March 2, 2006, the *Carlsson* trial was scheduled to begin in the family law department at the Ridgeway Courthouse. (Exhibits 7 & 12) Judge Thomas Cecil was the department's acting supervising judge that day and handled the master calendar. He assigned the *Carlsson* trial to Judge McBrien. (HT 449, 452)

Five or six minutes after Judge Cecil assigned the case, Ms. Huddle returned to his courtroom and attempted to make an oral motion to recuse Judge McBrien pursuant to Code of Civil Procedure section 170.6. The motion was denied as untimely. (HT 453)

Hearing evidence about assignment of the case

At the hearing, Ms. Huddle testified she had filed both oral and written motions in numerous other cases to disqualify Judge McBrien. She also had moved to disqualify other judges in other cases. (HT 327, 362-363, 366-367)

Ms. Huddle testified she had no independent recollection of Judge Cecil assigning the *Carlsson* case to Judge McBrien, or that she made an oral motion to disqualify Judge McBrien. (HT 326-327) Judge Cecil's testimony about the attempted disqualification is convincing as he had a "vivid" recollection of the incident, and his description was precise. (HT 453)

Judge McBrien testified that when the *Carlsson* trial was assigned to him, he did not know that one of the parties considered that he had a bias that would require his disqualification. (HT 616-617)

Thursday, March 2, 2006: Morning Session

At 9:18 a.m. on Thursday, March 2, 2006, Judge McBrien convened the *Carlsson* trial. (RT 25; HT 47; Exhibit 14, p. 408) Mrs. Carlsson was present with Ms. Keeley, and Mr. Carlsson was present with Ms. Huddle. SharAnn Chessire was the clerk and Robbie Joy was the court reporter.

Ms. Chessire was Judge McBrien's courtroom clerk, and had been his clerk since 1987. Ms. Chessire and Judge McBrien did not socialize outside of work. (Exhibit 40)

Judge McBrien did not have an assigned reporter in his courtroom. (HT 30) There were two court reporters available for law and motion matters in the family law division, but the attorneys have to provide the court reporter for family law trials. (HT 31) For the *Carlsson* trial, Ms. Huddle's office contracted with a court-reporting agency, which retained Ms. Joy, a freelance reporter. Ms. Joy had reported a trial involving Ms. Huddle in a prior matter, but she and Ms. Huddle were not personal friends and did not socialize. (HT 377-380, 401-403, 213-215) Ms. Joy had been in Judge McBrien's courtroom a couple of time but never reported a trial with him. (HT 378, 394-395) Ms. Joy testified her agency informed her it was going to be a two and a half day trial. (HT 403-404)

Before Judge McBrien heard the evidence, he read the parties' pretrial statements and understood the disputed issues were spousal support, the division of the residence and fourplex, and attorney fees. Based upon the pretrial briefs, the parties appeared to agree that Mr. Carlsson should receive the residence and fourplex, but they disagreed as to the value of both properties. (HT 36-41) Judge McBrien did not recall being advised of the existence of the lis pendens. (HT 196)

The trial began with Ms. Keeley presenting the court with a sealed offer containing Mrs. Carlsson's final best settlement offer. Ms. Huddle replied that she was aware of the offer but she had just received it and there was no time to draft a reply. (RT 25-26)

Ms. Huddle advised Judge McBrien that Mr. Carlsson previously wanted to keep the fourplex and Mrs. Carlsson wanted to sell it, but Mr. Carlsson now decided he no longer wanted the fourplex awarded to him. Ms. Huddle stated the major portion of

evidence was going to address the value of the fourplex, and such testimony was no longer necessary since Mr. Carlsson now agreed to sell that property. (RT 26)

Ms. Keeley replied that Mr. Carlsson always insisted that he wanted the fourplex, Mrs. Carlsson never proposed to sell the fourplex, and it was Mrs. Carlsson's position that the fourplex should be awarded to Mr. Carlsson. (RT 26-27) Ms. Huddle objected because Mr. Carlsson could not afford to keep both the residence and the fourplex, and pay off Mrs. Carlsson's share of both properties. (RT 27)

Judge McBrien indicated that the parties should have considered these issues when they were in the settlement conference. (RT 27) Ms. Keeley replied that Mrs. Carlsson would encourage Mr. Carlsson to sell the family residence. (RT 28)[3] Judge McBrien stated the parties were posturing, but he was willing to adjourn for a short period of time "if in fact there are some possibilities of settlement," and it seemed that all matters were "settleable." (RT 28, 29)

Judge McBrien adjourned for the parties to discuss the matter among themselves. Judge McBrien did not participate in the settlement discussions.[4] When Judge McBrien

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[3] At the hearing, Ms. Keeley conceded Mrs. Carlsson took different positions at different times as to the disposition of the residence and fourplex. By the time of trial, Ms. Keeley wanted Mr. Carlsson to receive the fourplex because of Mr. Mayo's civil lawsuit, his joinder motion, and the lis pendens, which clouded title to the fourplex, so that Mr. Mayo's lawsuit would be Mr. Carlsson's problem. (HT 500-501, 513)

[4] At the hearing, Judge McBrien testified he generally did not participate in settlement discussions after a case was assigned to him, unless the parties stipulated that he could act as both the potential settlement judge and the trial judge. Judge McBrien believed he was precluded from hearing the trial unless the parties stipulated that he could serve in both roles. (HT 615) Judge McBrien testified that if the parties had stipulated to award the fourplex to Mr. Carlsson, the trial testimony would have addressed only the fourplex's fair market value. (HT 49) Judge McBrien testified the *Carlsson* trial was the first time he had seen one party try to force another party to take property. (HT 79)

reconvened the trial, the parties stated they had not reached any agreements, and the evidentiary portion of the trial began. (RT 29)

As the petitioner, Ms. Keeley proceeded with Mrs. Carlsson's case-in-chief, and Mrs. Carlsson testified about her employment at the dental office, the number of hours she worked, the Carlssons' purchase of the fourplex rental property in 2001, and that she knew about Mr. Mayo's involvement in making repairs to the fourplex but she did not know about Mr. Mayo's partnership agreement with Mr. Carlsson. (RT 29-81) Mrs. Carlsson testified that she wanted Mr. Carlsson to keep the residence in return for an equalizing payment. (RT 56)

At about the midway point of Ms. Keeley's direct examination of Mrs. Carlsson, the parties conferred about a stipulation regarding tax returns; Judge McBrien asked the parties if they wanted a break and Ms. Huddle said yes because she wanted to use the ladies room. (RT 81) At 10:12 a.m., Judge McBrien declared a five-minute break. (Exhibit 14, p. 408; RT 81)

At 10:17 a.m., the trial resumed and Mrs. Carlsson returned to the witness stand. (RT 81; Exhibit 14, p. 408) After Ms. Keeley finished her direct examination of Mrs. Carlsson, Judge McBrien permitted Ms. Huddle to take a witness out of order, and she called Mrs. Carlsson's employer to testify about her wages and hours. (RT 87-90) Thereafter, Mrs. Carlsson returned to the stand and Ms. Huddle cross-examined her about her work hours and her knowledge of Mr. Mayo's involvement in the fourplex. (RT 91-136)

As Ms. Huddle cross-examined Mrs. Carlsson about her work hours, the following exchange occurred:

> "MS. HUDDLE: Your Honor, I am going to have to eat.
>
> "THE COURT: The reason I am going forward is because tomorrow afternoon I have a continuing trial. It has statutory preference. So, I'm

insuring that we're going to complete it by noon tomorrow. [¶] *Otherwise, we may as well call a mistrial right now.* Statutory preference.[5]

"MS. HUDDLE: Well, I have one witness driving up from Orange County and another one is driving from Toulare [*sic*] County today.

"THE COURT: That's fine.

"MS. HUDDLE: I don't know that—I didn't have any breakfast. I assumed I was going to get some lunch.

"THE COURT: I'm not intending to go with no break for anyone. I'm suggesting that maybe we can finish with this witness and take a short break?

"MS. HUDDLE: Okay. I also have the two experts coming tomorrow.

"THE COURT: *All I'm telling you is if it's not completed by noon, it's a mistrial.*

"MS. HUDDLE: Well, I'm—the value on the family residence has to be decided. There has to be an expert on that.

"THE COURT: I don't intend to argue with you either. *I'm telling you exactly what my availability is and if you want a mistrial at this point, you're welcome to it.*

"MS. HUDDLE: *Your Honor, we set the matter for two days.*

"THE COURT: Ma'am. Ms. Huddle, I have told you, I am not going to argue with you over it. You have your choices. I have given them to you. You might want to discuss it with your client, I would presume, discuss the potential witnesses. [¶] But certainly I have explained my availability and I do have another continuing matter tomorrow afternoon that has statutory preference.

"MS. HUDDLE: *I was just asking if* [*we*] *could have another afternoon. That's what I was going to ask.*

"THE COURT: *No.*

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[5] At the hearing, Judge McBrien testified he was in the midst of presiding over another trial when he started hearing the *Carlsson* trial. (HT 621)

"MS. KEELEY: Why don't we take that up and not waste our time now?

"THE COURT: *No. You don't have to ask me. You have to always ask the other party first before I will consider anything that either party wants.*

"MS. HUDDLE: I didn't know that if the Court was willing to give us another day. Then I will discuss it with—

"THE COURT: I'm not saying I am. I'm just saying you have to discuss it with the other party first before you bring it up with me.

"MS. HUDDLE: I certainly don't want to go forward anymore and—

"THE COURT: Do you want to complete this witness?

"MS. HUDDLE: I guess I can finish my list here." (RT 136-138, italics added)[6]

Hearing evidence about initial reference to a mistrial

At the hearing, Judge McBrien testified that when he made the above-quoted remarks, it was approaching 1:00 p.m. He was trying to complete the trial by noon the following day, which would have resulted in a day and a half of trial, even though the trial estimate was two days. (HT 57) He told Ms Huddle that he would call a mistrial "in an effort to try to encourage the people to move forward." (HT 57)

"Q. So do you not really mean it when you say 'a mistrial will happen tomorrow at noon'?

"A. I did not mean it." (HT 57)

Judge McBrien testified he used the possibility of a mistrial to push the parties along. (HT 58) He would not have declared a mistrial, however, if Ms. Huddle had requested one at that point. (HT 58) Judge McBrien testified:

"I'd been doing, at that time, family law for 16 years. I've had several cases with Ms. Huddle. *Ms. Huddle never completes her case within the*

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[6] All references in the reporter's transcript to "THE COURT" refer to Judge McBrien.

time estimate. I'm encouraging her to move the case along." (HT 59, italics added)

Judge McBrien conceded Ms. Huddle correctly stated the trial estimate was two days, but he referred to a possible mistrial because he was "suggesting" that a day and a half for the trial "would be desirous." (HT 59) Judge McBrien was asked what he meant when he told Ms. Huddle that she had "choices." (HT 60)

"Q. Isn't the choice here finish by noon tomorrow or have a mistrial?

"A. I don't believe so.

"Q. Is that the words you used to her? That those were the choices, finish tomorrow or mistrial? I know you say you really wouldn't have given her a mistrial, but that's not something you expressed; right?

"A. Correct.

"Q. What you're telling her is 'Finish by noon tomorrow or mistrial because I have this other case'?

"A. Correct.

"Q. So that's the choice you're giving her; correct?

"A. Right." (HT 60)

Judge McBrien testified it was his practice and procedure that one party had to ask the other party if they wanted more time before he would consider such a request. He made that statement to Ms. Huddle in the above exchange, and he had made that statement to her "more than once." (HT 207-208)

"[Q.] Did you believe that she understood what you were saying at that time?

"A. I hope so." (HT 208)

The trial continues

After the exchange between Judge McBrien and Ms. Huddle, the trial continued. Ms. Huddle cross-examined Mrs. Carlsson about her work hours, and Mrs. Carlsson

testified that she wanted Mr. Carlsson to keep the fourplex and sell the residence. (RT 138-139)

When Ms. Huddle concluded her cross-examination, Judge McBrien asked Ms. Keeley if she wanted to question the witness. (RT 141)

> "MS. KEELEY: Your Honor, I do have substantial redirect, but what I would do is limit my redirect to a very few questions, but seek the Court and Counsel's agreement that I could reserve the right to complete redirect, time permitting, later on.
>
> "THE COURT: Any objection?
>
> "MS. HUDDLE: What I don't want to have happen is we go forward and then there is a—
>
> "THE COURT: *You know, if you didn't think out loud, then—do you have any objection or not*? You're welcome to discuss it with your client. Please do so privately." (RT 141, italics added)

Ms. Keeley interjected that she would quickly conduct her redirect examination of Mrs. Carlsson about her work hours, her monthly expenses, and Mr. Mayo's involvement in the fourplex. (RT 141-142, 145-147) Ms. Huddle objected to a question about living expenses as beyond the scope of redirect. Ms. Keeley offered to discuss the matter at break and reach a stipulation, and moved on with her redirect examination. (RT 142-143)

Ms. Keeley completed her redirect examination of Mrs. Carlsson and Ms. Huddle said she did not have any more questions. At 12:57 p.m., the court declared the lunch recess. (RT 148; Exhibit 14, p. 408)

Thursday, March 2, 2006: Afternoon Session

At 1:35 p.m. on Thursday, March 2, 2006, Judge McBrien convened the afternoon session of the trial and the following exchange occurred. (RT 149; Exhibit 14, p. 408)

> "MS. HUDDLE: Before we proceed, your Honor, can we deal with this matter of *an additional half day*, whether or not the Court is going to allow us to have that at some other point in time?

"THE COURT: I'm certainly willing to do so. I always have to understand this. Whatever time we establish would run secondary to any already scheduled trial. [¶] But I try to make it in the afternoon so that it wouldn't likely pose a problem. [¶] Also, the parties might consider bifurcating those issues. They can bifurcate from this trial, so that also makes it a little easier.

"MS. HUDDLE: The Court has heard quite a bit on the four-plex.

"THE COURT: I'm not suggesting that you have to do anything. I'm just giving you some alternatives.

"MS. HUDDLE: With that in mind, we will pick another date that I think the Court will be available.

"MS. KEELEY: Wouldn't we do that if we don't get concluded by noon tomorrow?

"THE COURT: This is not the time to do that.

"MS. HUDDLE: *I just didn't want to go forward and have a mistrial. I wanted to know if that is available.*

"THE COURT: It's available. And to the extent we can bifurcate, I'm intending to do that also. [¶] Do you want to call the next witness?" (RT 149-150, italics added)

Hearing evidence about the request for an extra half-day

In his deposition, Judge McBrien testified he did not preclude Ms. Huddle from calling witnesses later in the trial, because "earlier in the transcript, I had offered them another option," that "was if they wanted to wait, they would not have any priority, but we could schedule them another day. If I was available, they would have that time. And if I was in another trial, that other trial would take precedence." (Exhibit 5, p. 17; HT 75) At his deposition, Judge McBrien testified that such an offer was reflected somewhere in the trial transcript. (*Ibid.*)

At the hearing, Judge McBrien was asked what he meant in his deposition testimony about offering an extra day to the parties. He testified that his deposition referred to the above-exchange (RT 149), where he offered the parties an additional half-

day. Judge McBrien conceded that he offered the parties an additional half-day so they would receive the full two-day trial, consistent with their estimate, and he did not offer additional time in excess of their two-day trial estimate. (HT 76) Judge McBrien testified he decided to add the second half-day because the parties requested it. (HT 61-62)

The trial continues

The trial continued with Ms. Keeley calling Richard Sutliffe, an expert who testified about the fair market values of the residence and fourplex. (RT 150-170) Ms. Huddle conducted an extensive cross-examination as to the valuations. (RT 171-189) Ms. Keeley conducted redirect examination (RT 189-191), Ms. Huddle conducted a very brief recross-examination, and the witness was excused. (RT 191) The court asked the court reporter if she wanted to take a break, and she replied that she was fine. (RT 192)

Ms. Keeley moved documentary exhibits into evidence, the parties addressed the admissibility of some of the documents, and the documents were admitted into evidence. (RT 192-196) Ms. Keeley rested Mrs. Carlsson's case. (RT 196; HT 62)

Ms. Huddle began Mr. Carlsson's case-in-chief by calling Joseph Mayo. Mr. Mayo testified that he worked in the real estate services division of the state's DGS, the same division where Mr. Carlsson worked. (RT 209-210) Mr. Mayo testified he started to work at the fourplex in 2002, and he signed the partnership agreement with Mr. Carlsson in October 2003. He filed the lawsuit against the Carlssons to enforce the partnership agreement, and he filed the joinder motion in the dissolution action to protect his alleged interest in the fourplex. (RT 196-207)

On cross-examination, Mr. Mayo testified he filed the lawsuit in pro per, but a friend's lawyer helped him draft the complaint, and Mr. Carlsson introduced him to this friend. (RT 214-215) Ms. Huddle conducted a brief redirect examination and Mr. Mayo was excused. (RT 218) Judge McBrien asked the court reporter if she wanted to take a

short recess, she said yes, and he called a recess at 3:20 p.m. (RT 218; Exhibit 14, p. 408.)

At 3:32 p.m., the trial resumed and Ms. Huddle called Mr. Carlsson to testify. (RT 218-219; Exhibit 14, p. 408) Mr. Carlsson testified that his friend Scott Moore found the fourplex property in Sacramento. They planned to buy it as an investment rental property, but it needed to be renovated and neither Mr. Carlsson nor Mr. Moore had any money to buy it. (RT 219)

Ms. Keeley objected to one of Ms. Huddle's questions to Mr. Carlsson as leading. Judge McBrien replied that he would not strike the response "only because *we have to move along*. You are leading." (RT 220, italics added)[7]

Mr. Carlsson continued with his testimony about the fourplex. He testified their friend, Don Minkoff, agreed to purchase the property and fund the cost of the renovation.[8] (RT 219) Mr. Carlsson met Mr. Minkoff through work. (RT 221) Mr. Carlsson and Mr. Moore told Mr. Minkoff about their plan to invest in a rental property, and Mr. Minkoff encouraged them volunteered to fund the project. (RT 221) There were no written contracts between the parties, but they verbally agreed that Mr. Minkoff would finance the purchase of the fourplex, and Mr. Moore and Mr. Carlsson would renovate the property. After the reconstruction, Mr. Moore and Mr. Carlsson planned to refinance the fourplex and pay back Mr. Minkoff with interest. (RT 221) Mr. Minkoff was to

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[7] At the hearing, Judge McBrien conceded Ms. Huddle had just started her case-in-chief when he told her to keep moving. (HT 65)

[8] As we will explain, *post*, Mr. Carlsson's direct examination testimony about his business relationship with Mr. Minkoff led to Ms. Keeley's extensive cross-examination on this point. As we will also explain, *post*, two of the misconduct allegations against Judge McBrien are based upon this exchange: his request for a transcript of Mr. Carlsson's cross-examination testimony, and his subsequent act in sending that transcript to Mr. Carlsson's employer.

receive no profit on the project other than interest. The parties agreed that title on the fourplex would be held by Mr. Carlsson, Mr. Moore, Mr. Minkoff, and their spouses. (RT 221, 222)

The fourplex was purchased with Mr. Minkoff's money, and neither Mr. Carlsson nor Mr. Moore used any of their own money to buy it. (RT 222) There were no written agreements but the title was held jointly by the three couples pursuant to their verbal agreement. (RT 222)

Ms. Huddle continued her direct examination of Mr. Carlsson and asked more questions about how Mr. Minkoff financed the purchase of the fourplex. The following exchange occurred:

> "THE COURT: I think we have that. *I just want us to move along.*
>
> "MS. HUDDLE: I want to make—there is a point of the money and the no agreements because they made such a point that there was no agreement between—or we don't know if there was this agreement between Mr. Carlsson and—
>
> "THE COURT: I'm just reminding you, *you have a limited period of time.* If it's not important, keep going." (RT 222-223, italics added)[9]

Ms. Huddle continued with her direct examination of Mr. Carlsson, who testified that Mr. Moore had to withdraw from the project after they purchased the fourplex. Mr. Carlsson asked Mr. Mayo if he wanted to become his partner and help renovate the fourplex. Mr. Mayo agreed and worked on the building renovations based on a verbal agreement that he would replace Mr. Moore as Mr. Carlsson's partner. (RT 226-229) Mr. Carlsson eventually entered into a written partnership agreement with Mayo in

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[9] At the hearing, Judge McBrien testified that he used this exchange to push Ms. Huddle again and stress how little time was available. (HT 66)

October 2003. (RT 233) At about the same time, Mr. Carlsson tried to arrange for refinancing so he could repay Mr. Minkoff. (RT 234)

At 4:00 p.m., Judge McBrien called the evening recess and adjourned until the next morning. Judge McBrien advised the parties that he had to call the calendar the next morning but he would be quick about it. (RT 234; Exhibit 14, p. 408)

Friday, March 3, 2006: Morning Session

At 8:47 a.m. on Friday, March 3, 2006, Judge McBrien reconvened the trial. (RT 260; Exhibit 14, p. 411) Ms. Huddle advised Judge McBrien that she intended to call Mr. Minkoff who lived in Newport Beach. (RT 260) Ms. Huddle explained Mr. Minkoff had just been diagnosed with cancer and started his treatments. (RT 262) Mr. Minkoff called her office the previous day and said he was going through chemotherapy. He had a bad reaction to the treatment and his doctor would not allow him to fly because his immune system was too low. He could travel only by car, and he could not appear that day. (RT 260-261)

> "[MS. HUDDLE:] . . . [N]ow he can't make it today, *which I understand we may be going another day*, but if we could have finished it today, that would have been good, if we could have finished it by noon, but it's obvious [Mr. Minkoff] is not going to be able to be here." (RT 260-261, italics added)

Ms. Huddle further explained that Mr. Minkoff had chemotherapy treatments on Wednesdays and he was not able to travel for two days afterwards, but his doctor would allow him to travel on Mondays and Tuesdays. (RT 261) Ms. Huddle said Ms. Keeley did not object to having Mr. Minkoff testify on another day, but Ms. Keeley declined to stipulate to his testimony because she wanted to cross-examine him. (RT 261)

Judge McBrien replied that he was not available for trial on Mondays, Tuesdays, and Wednesdays, because law and motion was heard on those days, but he was available the next Thursday or Friday. (RT 261) Ms. Huddle acknowledged the court's schedule,

but she hoped Judge McBrien could simply take Mr. Minkoff testimony on a Monday or Tuesday, or everyone would have to go to Newport Beach and take a videotaped deposition. (RT 262)

> "[MS. HUDDLE:] I can't tell [Mr. Minkoff] that he should risk his health and be here, but he is a major witness in the case. So, I wanted to bring it to the Court's attention so that we can decide what we want to do about this witness. [¶] I don't want to have my case heard without Mr. Minkoff testifying about the arrangement and why everybody's name was on title and what was the plan here.
>
> "THE COURT: Ms. Keeley? *I don't know whether this is a slow Motion for a Mistrial or what?*
>
> "MS. HUDDLE: No, it's a motion to have [Mr. Minkoff] heard on another day, a separate day.
>
> "THE COURT: And I indicated next Thursday and Friday I would be available in the afternoon." (RT 262, italics added)

Hearing evidence about "slow motion" for mistrial

At the hearing, Judge McBrien testified he made the comment about "a slow motion" for a mistrial because "we were engaged in about seven pages of discussion over when [Ms. Huddle] could schedule this witness . . . and I didn't quite know what the purpose of this grand discussion was." (HT 68) Judge McBrien added that he was "trying to interpret Ms. Huddle's involvement with this lengthy discussion over scheduling this witness." (HT 68)

> "Q. But you raised the possibility, again, of a mistrial; correct?
>
> "A. No. I questioned whether this is what she was doing. I mean, I used the word 'mistrial,' yes.
>
> "Q. [Ms. Huddle] hadn't suggested a mistrial, had she?
>
> "A. She had not at that point, no." (HT 68-69)

The trial continues

As Ms. Huddle continued her exchange with Judge McBrien, she explained that Mr. Minkoff would begin radiation in six weeks, and then there would be another 12 weeks of treatment. (RT 262) Judge McBrien asked Ms. Keeley if she wanted to respond. Ms. Keeley argued Mr. Minkoff was not a party, he would not have compelling information about Mr. Carlsson's arrangements with Mr. Mayo, and his testimony on that point would be hearsay. (RT 263)

Judge McBrien asked Ms. Huddle why Mr. Minkoff's testimony would be relevant, and whether Mr. Minkoff was a witness to Mr. Carlsson's agreement with Mr. Mayo. Ms. Huddle said no. (RT 264-265)

> "THE COURT: Then I would suggest that you think about your options. Be that as it may, let's move forward.
>
> "MS. HUDDLE: Is the Court going to indicate that he can come and testify when he physically is able or I will be allowed to do a video depo?
>
> "THE COURT: I'm not. *I'm hoping we're going to finish today and if we can't, we're going to finish next week and the days I would have available would be Thursday and Friday.*
>
> "MS. HUDDLE: So, then my request to let [Mr. Minkoff] come and testify another day is being denied.
>
> "THE COURT: I'm just telling you what my schedule offers, and that is the schedule that has been in place for the 16 or 17 years that I have been involved in this assignment.
>
> "MS. HUDDLE: He can come Thursday and Friday, but it would probably be twelve weeks down the road after his chemotherapy is over with.
>
> "THE COURT: I don't intend to argue with you about it. I am just indicating that you know what our schedule is. *If in fact the parties are willing to do it over a noon hour, I'm willing to stay in session over a noon hour. That's not really something that you should raise with me as an initial point.* Okay?

"MS. HUDDLE: I still think I'm obligated to get some kind of ruling on it that he can't testify at any other time. Are you indicating I should speak with opposing Counsel about a noon hour? I will be happy to do that.

"THE COURT: Okay, I will rule. *I'm going to deny your request to be in session on this trial on next Monday or Tuesday during the 8:30 to 12:00 o'clock calendars and the 1:30 to 4:00 o'clock calendars.*

"MS. HUDDLE: I'm not asking for next Monday or next Tuesday, I am asking for any time that's consistent with [Mr. Minkoff's] health.

"THE COURT: *Denied. It's unspecific. Let's move on.*

"MS. HUDDLE: Then I want to make it specific because this is an important witness, your Honor. If I'm not going to be allowed to have him because the Court is not considering that this is an important issue, then I need to know that the Court doesn't feel like he is important and you are just not going to let him testify.

"THE COURT: I have told you three times why I'm making the ruling. The ruling is based upon our calendars. I am not available. [¶] There is absolutely nobody in the Sacramento Superior Court system that could sit in, in my place on Monday or Tuesday of next week.

"MS. HUDDLE: How about the deposition testimony videotaped?

"THE COURT: I'm not adverse to it.

"MS. HUDDLE: Okay, then I will discuss that with Counsel and maybe make [arrangements] to try to get that done instead.

"THE COURT: Okay.

"MS. HUDDLE: Thank you, your Honor.

"THE COURT: But I would also strongly urge you to keep in mind that I intend, if we need to extend it, to extend it to next week, no matter what your calendars reflect. The reason would be the longer these cases get stretched out, the less that is recalled about it." (RT 265-267, italics added)

Thereafter, Ms. Huddle continued with Mr. Carlsson's case-in-chief and called a friend of Mrs. Carlsson (RT 268-271) and a vocational consultant (278-290), whose testimony supported Mr. Carlsson's contentions that Mrs. Carlsson was underemployed.

Ms. Huddle next called a mortgage loan consultant, who testified that when he met with Mr. Carlsson to refinance the fourplex, Mr. Carlsson said Mr. Mayo was his partner. Mrs. Carlsson was not present during the conversation. (RT 272-277)

Ms. Huddle next called Scott Moore, who also worked with Mr. Carlsson as a real estate officer for the state's DGS. (RT 291) Mr. Moore testified they obtained a loan from Mr. Minkoff to purchase the fourplex, and Mr. Minkoff carried the loan at six percent. The parties verbally agreed that Mr. Moore and Mr. Carlsson would renovate the fourplex, then refinance the property and repay Mr. Minkoff. Mr. Moore and Mr. Carlsson did not plan to make any financial investments in the fourplex, except for their "sweat equity" to renovate and rent the property. (RT 292) The parties did not have a written agreement but the Carlssons, Moores, and Minkoffs placed their names on the fourplex's deed. (RT 292, 297) Mr. Minkoff recommended a general contractor, who was hired and placed in charge of the renovation. Mr. Moore had to withdraw from the venture in July 2002, when he was recalled to active duty in the service, and the Moores signed their title interests to the Carlssons and Minkoffs. Mr. Moore did not know anything about Mr. Mayo's involvement in the fourplex. (RT 294-298)

Ms. Huddle advised Judge McBrien that her next witness was a real estate expert, the expert would arrive at 11:30 a.m., and he would take quite a bit of time to testify about both the residence and fourplex. Ms. Huddle also planned to recall Mr. Carlsson. (RT 299) Judge McBrien said he had a judge's meeting at noon. (RT 299) Ms. Huddle asked what day they should return to finish the trial case. Judge McBrien told the parties to suggest an afternoon date. Ms. Keeley replied that she was serving as a pro tem the following Thursday, but thought she could arrange a substitute. (RT 300)

Judge McBrien advised the parties that another day of trial would be held on Thursday, March 9, 2006, at 1:30 p.m. (RT 300) Judge McBrien asked if the parties

wanted a recess. Ms. Huddle replied it would be nice because she also wanted to use the ladies room. (RT 300) At 9:52 a.m., Judge McBrien called a recess. (Exhibit 14, p. 411)

At 10:01, the trial reconvened (Exhibit 14, p. 411) and Ms. Huddle continued with Mr. Carlsson's case-in-chief. She recalled Mr. Carlsson and asked to mark several exhibits. At 10:07 a.m., Judge McBrien took a brief recess so the parties could mark the exhibits. At 10:12 a.m., the trial resumed and Mr. Carlsson returned to the stand. (RT 302-303; Exhibit 14, p. 411)

Mr. Carlsson testified he brought Mr. Mayo into the fourplex deal after Mr. Moore withdrew. Mrs. Carlsson knew Mr. Mayo was his new partner, but he never told her about the written partnership agreement with Mr. Mayo. (RT 304-307) Mr. Carlsson also testified about rental income he received from the fourplex, and the amount due on the mortgages for the fourplex and residence. (RT 307-312)

In the course of Mr. Carlsson's direct examination, Ms. Huddle paused to introduce several documentary exhibits, and Ms. Keeley did not object. (RT 313-314) The following exchange occurred:

> "MS. HUDDLE: Your Honor, we just want to check on the completeness of the exhibits to make sure there are signatures on them.
>
> "THE COURT: *Your time is waning, but go ahead.* You can check.
>
> "MS. KEELEY: I guess I will have to retrieve the exhibits from the Court, your Honor.
>
> "MS. HUDDLE: Okay. This is the shortest way rather than reintroduce them all over again.
>
> "THE COURT: This is the reason we have settlement conferences.
>
> "MS. HUDDLE: I was willing [to] stay, your Honor. I was there. I said, 'These little issues should be decided.' I said that." (RT 314-315, italics added)

Hearing evidence about "time is waning" comment

At the hearing, Judge McBrien testified he made the comment that Ms. Huddle's time was "waning" because "[s]he has a limited amount of time. Time is moving on, but—I was just reminding her of that, but check her exhibits." (HT 69) Ms. Huddle testified that when the judge said her time was waning, she took it "as him telling me I was wasting my time." (HT 230)

The trial continues

After the parties agreed about the exhibits, Ms. Huddle continued with her direct examination of Mr. Carlsson, who testified that Mrs. Carlsson never asked about Mr. Mayo's interest in the fourplex until after she filed for divorce. Mr. Carlsson told her that they needed to put Mr. Mayo's name on the title because of the partnership agreement, and she said that she just wanted her money and didn't care about Mr. Mayo. (RT 315-319) Mr. Carlsson testified that he still owed about $16,000 to Mr. Minkoff on the fourplex loan, the loan was due in 2005, and Mr. Minkoff had never attempted to collect it. (RT 330)

Ms. Keeley's cross-examination of Mr. Carlsson focused extensively on the nature of Mr. Minkoff's loan to purchase the fourplex. Mr. Carlsson answered all of Ms. Keeley's questions without any objections from Ms. Huddle.

Mr. Carlsson testified there was no written loan agreement between the parties, but Mr. Carlsson and Mr. Moore placed the Minkoffs on the title for the fourplex to make sure Mr. Minkoff was repaid. (RT 343) Mr. Carlsson explained that his own background was in planning, but Mr. Moore was a real estate officer and Mr. Minkoff was a developer, and Mr. Carlsson trusted them to handle the legal matters for the loan. (RT 343)

> "[MS. KEELEY:] Yesterday, Mr. Carlsson, you testified, 'Nobody works for free.' Do you recall that?

"A. Correct.

"Q. You also testified, I believe, that Mr. Minkoff borrowed money on his equity loan, gave it to you and you paid him back the money he borrowed plus the interest he would have paid on the money; correct?

"A. That's what I was told.

"Q. So, Mr. Minkoff would have been working his money for free?

"A. That's correct, which was very hard for me to believe.

"Q. How long have you known Mr. Minkoff?

"A. For at least ten years." (RT 347)

Mr. Carlsson testified he met Mr. Minkoff while he worked on a project in his employment as a space planner for the real estate services division of the state's DGS. (RT 348)

"Q. Who does Mr. Minkoff work for?

"A. He works for himself.

"Q. What does Mr. Minkoff do?

"A. He's a Developer.

"Q. A Real Estate Developer?

"A. Correct." (RT 348)

Mr. Carlsson testified he worked with Mr. Minkoff on a project in West Covina. Mr. Carlsson was one of the people assigned to the project, and he worked as a space planner to lay out the design work. (RT 348-349)

"Q. What was Mr. Minkoff's interest in that project?

"A. He owned the building. He had owned it for 30 years and there had been a long lease on it.

"Q. Who was the lessee?

"A. The State of California.

"Q. The General Services Department, specifically?

"A. Correct.

Q. So, there was a contractual relationship between the General Services Department, of which you are an employee, and Mr. Minkoff?

"A. Correct.

"Q. When you met him?

"A. Correct.

"Q. Did Mr. Minkoff continue to have other contractual relationships with the Department of General Services?

"A. Yes, he did.

"Q. Did he have contractual relationships with the Department of General Services in 2001?

"A. I don't recall.

"Q. Did he have contractual relationships with the Department of General Services after 2001 and through the current date?

"A. Yes.

"Q. Are there rules promulgated by the Department of General Services that prohibit employees of the State of California from having contractual relationships with vendors or other entities with whom their Department does business.

"A. There are certain rules; correct.

"Q. *Is it not a conflict of interest for Mr. Minkoff to have a contractual relationship with your employer and have a personal, financial relationship with you?*

"A. *I don't believe so.*

"Q. *But it is your testimony that Mr. Minkoff borrowed money and had loaned it to you at no cost to you for no reason, other than he was a nice guy?*

"A. *He loaned it to Scott Moore and I.*

"Q. *For no compensation?*

"A. *That is correct. No compensation.*

"Q. Is it possible that Mr. Minkoff was hoping for compensation in the form of continuing to have a good business relationship with the State of California?

"A. He does lots of work with lots of people in the office.

"Q. *Does your Supervisor know that you and Mr. Minkoff were on title to real property together from 2001 to 2004?*

"A. *I don't know.*

"Q. Did you ever tell him?

"A. I don't know. We don't discuss it.

"Q. *Do you fill out any forms, for example, a document required by the Office of Fair Political Practices as a State employee*?

"A. *Yes.*

"Q. *Don't you have to list all of the investments that you have on that form?*

"A. *Not all the investments; certain investments.*

"Q. *Did you list the 24th Street property* [*fourplex*] *on that form?*

"A. *No, I don't believe I did.*

"Q. *Why not?*

"A. *Because I didn't think it was applicable to what I had to list.*

"Q. *Did you, on that form, indicate in any way that you had a personal, business relationship with Mr. Minkoff?*

"A. *No. There was nowhere on the form that would ask for that.*" (RT 349-351, italics added)[10]

When Ms. Keeley completed her cross-examination, the following exchange occurred between Judge McBrien and Mr. Carlsson, who was still on the witness stand:

"THE COURT: Ms. Huddle? [¶] First, let me, just for a point of clarification, *when you said you filed this statement or document with the Fair Political Practices Board, is that a document commonly called a, 'Statement of Economic Interests'*?

"[MR. CARLSSON]: *I would have to look at it. It gets thrown in front of us, we sign it, turn it in.*

"THE COURT: You don't have to complete any documents.

"[MR. CARLSSON]: There is a box where you like—whatever I have doesn't apply, and with so many other forms that we are given, it's just like a formality of paperwork. It just gets filed.

"THE COURT: This is filed with the Secretary of State?

"[MR. CARLSSON]: *I have no idea. I give it to our Secretary and she takes care of it.*" (RT 359, italics added)

Ms. Huddle conducted her redirect examination of Mr. Carlsson, and asked about his specific title and duties. (RT 359-360) Mr. Carlsson testified he was a supervising space planner with the state's DGS, and he did not negotiate or make any decisions about which bids are accepted by the state. Mr. Carlsson testified that leasing officers negotiate the deals, he was a space planner and he was not involved in the extensive bidding process, he did not select the builders or buildings for lease, and he only assigns projects to the space planners after "the deal is put together." (RT 360-361)

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[10] As we will discuss in Part V, *post*, at some point after Mr. Carlsson's cross-examination testimony on March 3, 2006, Judge McBrien requested a transcript of the testimony set forth above, and subsequently sent that transcript to Mr. Carlsson's employer, the state's DGS. Mr. Carlsson was later dismissed from his job because of his relationship with Mr. Minkoff.

Mr. Carlsson testified he did not make any decisions on any pieces of property related to Mr. Minkoff: "I don't sign leases. I don't negotiate deals. No." (RT 362) Mr. Carlsson testified he met Mr. Minkoff on a government project, Mr. and Mrs. Carlsson later became social friends with Mr. and Mrs. Minkoff, and they spent time at the Minkoffs' house in Newport Beach. (RT 361-362)

Ms. Huddle then asked Mr. Carlsson to review documents regarding the fourplex's income and expenses. (RT 362-363) Judge McBrien interrupted and the following exchange occurred while Mr. Carlsson was still on the witness stand. (HT 71, 232)

> "THE COURT: I am going to have to adjourn this proceeding. They are awaiting me downtown. So we will resume on Thursday at 1:30. [¶] *I would ask you to bring a copy of your 2004, whatever this document is, that you filed with the Fair Political Practices Commission with the Secretary of State.*
>
> "THE WITNESS: *Okay.*
>
> "THE COURT: Thank you.
>
> "MS. KEELEY: *Your Honor, would we need copies of that document for 2002 and 2003?*
>
> "THE COURT: *You should probably bring them for those years, but you also might want to talk to an attorney who specializes in that area because there are potential penalties far beyond what we're talking about today.*
>
> "MS. HUDDLE: Your Honor, on the issue of Mr. Minkoff testifying, which I think is more important now, are you intending that we be allowed an opportunity—
>
> "THE COURT: Have you talked to Ms. Keeley about this?
>
> "MS. HUDDLE: Yes, we did a little bit. We're wondering, if we have to do it between now and Thursday—
>
> "THE COURT: I have no intent regarding it. I'm just advising you for the most part that the following week, I am not here.

"MS. HUDDLE: Thank you, your Honor.

"THE COURT: And that is not to suggest you will have the week after that either.

"MS. HUDDLE: Well, as soon as possible as far as I'm concerned." (RT 363-364, italics added)

At 12:07 p.m., Judge McBrien declared a recess, with the trial to resume on Thursday, March 9, 2006, at 1:30 p.m. (RT 364; Exhibit 14, p. 411)

Hearing evidence about request for Mr. Carlsson's Statement of Economic Interest

At the hearing, Judge McBrien testified he asked Mr. Carlsson to produce his Statement of Economic Interest after he heard Mr. Carlsson's testimony, and conceded that Ms. Keeley did not request the documents. (HT 131-132) He testified it was a request and not an order, and it would have been reasonable for Ms. Huddle to interpret his statements as a request. (HT 132) Judge McBrien explained that when he spoke of "'potential penalties far beyond what we're talking about,'" he referred to whether Mr. Carlsson disclosed his business relationship with Mr. Minkoff, who conducted business with Mr. Carlsson's employer, the state's DGS. (HT 132-133) Judge McBrien testified:

> "From the testimony, it appeared that his evidence, his testimony, could have involved a violation of the Fair Political Practices Act. And if he included it in his Statement of Economic Interest, it becomes a nonissue. *If he doesn't include it, then it becomes an issue for our hearing.*" (HT 133, italics added)[11]

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[11] As we will discuss *post*, a person who knowingly or willfully violates any provision of the Political Reform Act (PRA) is guilty of a misdemeanor (Gov. Code, § 91000, subd. (a)), but the Fair Political Practices Committee (FPPC) does not conduct any criminal investigations or prosecutions. Instead, the Attorney General and/or the District Attorney are responsible for enforcing the criminal provisions of the PRA. (Gov. Code, § 91001, subd. (a).)

Judge McBrien testified he was "looking to see whether there would be a problem for this case as it related to the rules" of the Fair Political Practices Act, and whether Mr. Carlsson disclosed his business relationship with Mr. Minkoff. (HT 133)

"Q. Why did you suggest that perhaps Mr. Carlsson should talk to an attorney who specializes in the area?

"A. Because he had testified that he did not include that information. *And I was concerned that he, frankly, was potentially in violation of the law and might want to talk to an attorney to get some legal advice.*

"Q. And someone who specializes in the area rather than Ms. Huddle?

"A. *Ms. Huddle did not appear to have an idea of what we were talking about.*" (HT 134, italics added)

Judge McBrien testified he also believed Mr. Carlsson's Statement of Economic Interest would reflect Mr. Carlsson's opinion as to the annual income from the fourplex rental property. (HT 133-134)

Thursday, March 9, 2006: Afternoon Session

At 1:25 p.m. on Thursday, March 9, 2006, Judge McBrien reconvened the trial. (RT 366; Exhibit 14, p. 418) Ms. Huddle stated that Mr. Minkoff had been driven from Newport Beach to Sacramento and he was prepared to testify. Judge McBrien asked if the case had settled and the attorneys said no. (RT 366)

Thereafter, the following exchange occurred:

"THE COURT: *On the record, did your client consult some legal advice regarding that issue?*

"MS. HUDDLE: I found him a lawyer.

"THE COURT: *Did he bring the documents with him*?

"MS. HUDDLE: He never went to work. He is on disability; he doesn't have them.

"THE COURT: *So, he has violated my request to bring those documents?*

"MS. HUDDLE: *The way I heard you say it, it was a suggestion that he bring them.*

"THE COURT: *Do you want me to have the record read?*

"MS. HUDDLE: He would have to go to work to see if he even has a copy.

"THE COURT: *Ma'am, I would suggest that he send somebody to his workplace to get those documents before we conclude this trial.*

"MS. HUDDLE: Your Honor, I would like to impose an objection. I know it's what the Court would like, but I would like to impose an objection to those records because *they are irrelevant to the division of the community property—*

"THE COURT: Overruled. *I am not indicating that they are relevant. They are going to clarify his testimony. However, they may be relevant to other proceedings. That's why I advised him to go and talk to independent Counsel.*

"MS. HUDDLE: The independent Counsel wanted $5,000. He doesn't have $5,000 to give him before they will talk to him. The firm is Sweeney and Greene—

"THE COURT: In any case, he can send somebody to go get those records.

"MS. HUDDLE: *I am going to have to advise him to take the Fifth Amendment if there is some claim, some potential criminal action and he has been unable to discuss it with an attorney who actually knows the law.* I can't have him testify and—

"THE COURT: *I think you're too late for that.*

"MS. HUDDLE: Too late?

"THE COURT: *He has already testified regarding the sum and substance of that and his employer will have a copy of the documents.*

"MS. HUDDLE: Are you indicating that he can't take the Fifth Amendment now?

"THE COURT: I'm not indicating anything. *I'm indicating that you need to send somebody to his employment to pick up those documents.*

"MS. HUDDLE: If he is taking the Fifth Amendment, then those documents would be part of it.

"THE COURT: Those documents are on file with the Secretary of State. I could go to the Secretary of State's Office and get a copy of them.

"MS. HUDDLE: Ms. Keeley never raised this issue. If she believed it was really an issue, why didn't Ms. Keeley get those documents? We're here at trial now and—

"THE COURT: *Ms. Huddle, you are out of the* [*sic*] *order. It was my request, not Ms. Keeley's request.*

"MS. HUDDLE: I think you would potentially, although I don't know—

"THE COURT: Ms. Huddle, do you wish to ask your client to send somebody to get the records?

"MS. HUDDLE: If he provides those and he gets charged with something for having provided them—

"THE COURT: Yes or no?

"MS. HUDDLE: Is the Court indicating that he cannot assert his Fifth Amendment?

"THE COURT: I'm not indicating any such thing. *The documents are not a part of the Fifth Amendment. It's what he states out of his mouth that is a part of the Fifth Amendment.* [¶] Those are public documents at this point. They are on file—assuming they are the ones that he described—on file at the Secretary of State's Office. *As a convenience to the Court, I have asked him to bring us a copy.*

"MS. HUDDLE: I suppose—this is all on the record. I don't know what to do in a situation like this *when you're actually asking him to produce evidence which might incriminate him and it's not even the opposing side presenting it.*

"THE COURT: *Ms. Huddle, am I to take that as a 'no' placing you in the possibility of contempt*?

"MS. HUDDLE: No. I will tell him to go get the records—

"THE COURT: I'm not suggesting that he needs to—

"MS. HUDDLE: —if the Court is ordering him to produce [them].

"THE COURT: —absent himself. *I'm suggesting he needs to send somebody, given the fact that he hasn't done it in the week that's transpired to go get it so he can also attend this trial.*

"MS. HUDDLE: We will have to find if somebody here will go and do it and if it's there—

"THE COURT: Ms. Huddle.

"MS. HUDDLE: I don't know who—

"THE COURT: *Ms. Huddle, you don't need to think out loud."* (RT 366-370, italics added)

Hearing evidence about contempt discussion

At the hearing, Judge McBrien was asked about each aspect of the above-exchange with Ms. Huddle, beginning with his initial statement that Mr. Carlsson "'violated my request'" to bring the documents to court. (HT 135)

"Q. How could he violate a request?

"[JUDGE MCBRIEN]. Maybe it's a poor choice of words. He did not comply with the request. How's that?

"Q. It's still a request, not an order?

"A. It was." (HT 135)

Judge McBrien was asked about the next sequence, when Ms. Huddle said he had suggested that Mr. Carlsson bring the documents, and Judge McBrien asked Ms. Huddle whether he should have the record read. (HT 135)

"[Q.] What did you mean by that?

"A. I thought that clearly one of us was wrong or both of us were wrong, and that was an option that was available.

"Q. What did you think the record would show?

"A. What had actually been requested more so than our memories, a week later, seem to suggest it—suggest.

"Q. There was no question about what had been requested; correct? We knew what documents you're talking about?

"A. What the form of the request was.

"Q. Whether it was a request or order?

"A. Correct.

"Q. Mandatory or not?

"A. Correct.

"Q. You already told us you think it was a request?

"A. Correct.

"Q. And she's telling you, 'I think it was a suggestion, the way I heard it'; correct?

"A. That's what she said.

"Q. So did you want to look at the record because it might show it was an order?

"A. *I wanted to give the option of looking at the record so we could clarify this discussion that we were having.*

"Q. *So to this point at least, they had a choice, though, whether or not to bring the documents in*?

"A. *They did.*" (HT 135-136, italics added)

Judge McBrien was asked about the next sequence, when he "'suggest[ed]'" that Mr. Carlsson send someone to his office to retrieve the documents before the completion of trial. (HT 136-137)

"[Q.] And you're still using the word 'suggest' here. Is it still a request?

"A. It is. *It's becoming a little stronger, but it is still a request.*" (HT 137, italics added)

Judge McBrien was asked why he overruled Ms. Huddle's relevance objection and said the documents might not be relevant. He testified:

> "Since I didn't have the document, I didn't know what the document said. If Mr. Carlsson had disclosed this relationship and this property on the document, it becomes irrelevant for my needs, *which is basically seeing what impact the FPPC potential action might have on this piece of property. If it isn't included, then, frankly, I intended to have the attorneys give me their respective opinions as to what impact, if any, this lack of information might have. But we never got to that point.*" (HT 137-138, italics added)

Judge McBrien testified about why he believed nondisclosure would affect the property interests in the dissolution case. (HT 138)

> "Q. Can you explain how you thought that might work?
>
> "A. Well, in my experience, the FPPC rules are a little bit difficult. And while we can read in the paper about them issuing fines against various politicians and such, *I was unclear as to whether they also had powers of confiscation or liens or anything else that might impact the four-plex.*
>
> "Q. So you thought that if someone didn't disclose a property in their Statement of Economic Interest, the FPPC might have the right to take action against the property?
>
> "A. I thought that was a possibility, but I was expecting the attorneys to tell me.
>
> "Q. *So you thought maybe the FPPC could put a lien on the property*?
>
> "A. *Possibly.*
>
> "Q. Acquire an ownership interest?
>
> "A. Possibly.
>
> "Q. *Do you have any idea if the FPPC has that kind of authority*?
>
> "A. *Since that time, I called them and asked them, and they do not. At that time, I did not want to call them because I didn't want to be investigating independent of the evidence that was presented to me.*

"Q. At this time, when you were asking for these documents, had you ever heard of the FPPC putting a lien on someone's property for failure to disclose?

"A. I, frankly, don't really follow that much about the FPPC. So I would have to say I hadn't heard of a particular instance." (HT 138-139, italics added)

"Q. *By the way, did you ever say on the record that the reason you wanted those documents was because of this possibility of an FPPC lien*?

"A. *I didn't.*" (HT 140-141, italics added)

Judge McBrien conceded that in his initial response to the Commission, he did not state that he thought the FPPC could have placed a lien on the fourplex for a disclosure violation, because he did not have the trial transcript to refresh his recollection as to the reasons he asked for the documents. (HT 148, Exhibit 2)

Judge McBrien testified that he told Mr. Carlsson to retrieve the records even though Ms. Huddle advised him that Mr. Carlsson had not been able to consult an attorney. (HT 140) Judge McBrien rejected Ms. Huddle's Fifth Amendment objection because he felt any privilege was waived when Mr. Carlsson testified about these issues. (HT 140)

Judge McBrien was asked about the sequence when he told Ms. Huddle that he was not "'indicating anything,'" but that "'you need to send somebody to his employment to pick up those documents.'" (HT 141)

"Q. *So is this an order now*?

"A. *It's becoming one.*" (HT 141, italics added)

Judge McBrien next explained his response when Ms. Huddle said that she did not want to produce possibly incriminating documents not requested by their opponent. (HT 143)

"[Q.] . . . And your response at that point . . . is: 'Ms. Huddle, am I to take that as a no, placing you in the possibility of contempt?' [¶] *What were you going to find her in contempt for?*

"A. *I couldn't. There hadn't been a clear order.*

"Q. *So why did you raise the possibility of contempt*?

"A. *I'm explaining the landscape.*

"Q. What does that mean?

"A. *That means that she's resisting. I'm getting, for the most part, stronger and stronger in my wording. And eventually it's going to become an ever-so-clear order, if need be, at which point if she continues her course of resistance, the possibility of contempt becomes an option.*" (HT 143-144, italics added)

Judge McBrien testified he was not being impatient or discourteous with Ms. Huddle during this exchange. (HT 144)

Judge McBrien was asked about a statement in his initial letter to the Commission where he regretted "'mentioning even the possibility of contempt to Ms. Huddle under the circumstances and believes that he was momentarily and inappropriately frustrated with Ms. Huddle's misapplication of the Fifth Amendment.'" (HT 145, Ex. 2, p. 37)

"Q. So you were frustrated with her?

"A. At least with her misapplication of the Fifth Amendment.

"Q. You were frustrated with her that she was resisting your request to get the documents?

"A. Not necessarily that, but with her construction of the Fifth Amendment and how it applied or didn't apply.

"Q. And is that why you threatened her with contempt?

"A. No.

"Q. You state here that you were inappropriately frustrated. Why was it inappropriate?

"A. I don't believe a judge should ever be frustrated.

"Q. Were you being impatient with her?

"A. Or be impatient.

"Q. Were you being impatient with her?

"A. I don't believe so." (HT 145-146)

Also at the hearing, Judge McBrien was asked about a statement in his initial letter to the Commission, when he said that Mr. Carlsson's Statement of Economic Interest was relevant to the dissolution trial because it likely contained his opinion about the fourplex's value and rental income. (HT 146-147, 153, Exhibit 2, p. 37) Judge McBrien testified the documents would have been relevant if they contained valuation information. (HT 148) Judge McBrien was asked to review the trial testimony, where Mr. Carlsson testified that he did not list the fourplex in his statement of economic interest. (HT 149)

> "Q. If he hadn't disclosed it—if he's correct, as he says here, that he didn't disclose anything, then the documents aren't going to be useful in determining the fair market value of the property or the rental it receives; correct?
>
> "A. For that purpose, no." (HT 150)

Judge McBrien testified he was familiar with the FPPC Statements of Economic Interest because he also was required to complete the documents, and the Commission introduced a sample form into evidence at the hearing. (HT 150, Exhibit 35) Judge McBrien conceded that while the form requested disclosure of both the fair market value and rental income from property, both inquires provided only check boxes with ranges for such values, such as $100,001 to $1,000,000 for property values, and $10,001 to $100,000 for rental income. Upon reviewing the sample form, Judge McBrien conceded Mr. Carlsson's Statement of Economic Interest would not have helped settle the dispute about the value or the income of the fourplex. (HT 152-154)

Judge McBrien was asked about the letter he personally wrote to the Commission in August 2008, where he stated that Mr. Carlsson's testimony about the fourplex presented "'possible criminal activity or at least a conflict of interest.'" (HT 154-155, Exhibit 3, p. 72) Judge McBrien testified the letter reflected his thinking at the time, but he did not have the benefit of the trial transcript to refresh his recollection as to his reasons. (HT 155)

"Q. Now that you've had that benefit, why did you want the documents?

"A. *I wanted the documents to determine whether or not there was going to be an issue in terms of the disposition of the four-plex based upon the FPPC rules that, were it not included, I was going to have the attorneys each provide their insight as to what the rules required, if any impact.*

"Q. As it happened, did you ever get those documents?

"A. I did not.

"Q. *So you made your decisions without seeing the documents*?

"A. *I did.*" (HT 155-156, italics added)

In his deposition, Judge McBrien testified that he asked Mr. Carlsson to produce his Statement of Economic Interest to clarify his testimony about his business relationship with Mr. Minkoff in the fourplex. Mr. Carlsson's failure to disclose that relationship might have "in some fashion" affected the value of the fourplex. (Exhibit 5, pp. 39, 40) Judge McBrien thought the FPPC might have the power to "either file liens or otherwise take property" if Mr. Carlsson failed to disclose his business relationship in the fourplex with Mr. Minkoff. (Exhibit 5, p. 39)

At the hearing, Ms. Huddle testified that when Judge McBrien said she "'violated'" his request to produce Mr. Carlsson's Statement of Economic Interest, she thought she had "misheard or something, and he had made an order that there was a violation of his order," because "it would have been a direct contempt of my client" for

failing to produce his Statement of Economic Interest. (HT 235) Ms. Huddle was extremely concerned as the exchange continued and Judge McBrien mentioned the possibility of contempt, and she perceived Judge McBrien's comments as a threat "that I could potentially be put in jail if I didn't comply with what he wanted." (HT 236-237)

Ms. Huddle testified that she was trying to assert Mr. Carlsson's Fifth Amendment privileges when Judge McBrien requested the production of his Statement of Economic Interest, and she also argued the statement was irrelevant to the dissolution trial. (HT 340-342) She conceded that she did not object to Mr. Carlsson's testimony when Ms. Keeley cross-examined him about Mr. Minkoff's financial involvement in the fourplex. (HT 344)

The trial continues

The trial continued after the court's exchange with Ms. Huddle regarding Mr. Carlsson's Statement of Economic Interest. Ms. Keeley stated that she had just received a new appraisal for the fourplex from Mr. Carlsson's appraiser. Ms. Keeley asked for a recess to deliver the new appraisal to Mrs. Carlsson's appraiser, Mr. Sutliffe, who was in the courthouse on another case. Judge McBrien agreed and adjourned for a few minutes. (RT 370)

When the trial resumed, Ms. Huddle called Mr. Minkoff to the stand. (RT 370) Ms. Huddle asked Mr. Minkoff to explain why he could not appear the previous week. Mr. Minkoff testified he had chemotherapy the previous Wednesday. He lived in Newport Beach and could not fly because it would make him sick, and he could not find anyone to drive him to Sacramento. (RT 371)

Ms. Keeley objected to Mr. Minkoff's testimony about his health as irrelevant and Judge McBrien sustained the objection. (RT 372) The following exchange ensued:

> "MS. HUDDLE: There were previously requests made and I do believe there was some disbelief in that regard, so I wanted to make clear that this indeed was the case, that he was not available and that he is here today.

"THE COURT: *You know when you tendered that explanation last week, no one objected to it. I think we ought to move on with the trial, with the substance of the matter.*" (RT 372, italics added)

Ms. Huddle continued her direct examination of Mr. Minkoff, who testified that he was a real estate investor, he met Mr. Carlsson in 1994, and Mr. Carlsson and Mr. Moore approached him in 2001 and asked for money to purchase the fourplex. Mr. Minkoff agreed to provide them with the money as a loan against the fourplex, which had been condemned and had to be rehabilitated. (RT 372-373)

Ms. Huddle paused from questioning Mr. Minkoff and addressed the court:

"MS. HUDDLE: Your Honor, I got cut short on some preliminary questions. I did want to ask, because you do judge demeanor and I want the Court could [*sic*] to be aware of Mr. Minkoff's condition so that, that can be factored—

"THE COURT: *Ma'am, move on with the questioning. This is not a law school class. Move on with the questioning. You don't have to explain every one of your motives.*" (RT 373-374, italics added)

Hearing evidence about "law school" comment

At the hearing, Ms. Huddle testified that she wanted Mr. Minkoff to testify about his physical condition because Judge McBrien and Ms. Keeley expressed some disbelief about Mr. Minkoff's illness during the previous court hearing. (HT 357-358) Ms. Huddle testified Mr. Minkoff was very ill and he wore a mask at the trial. She wanted to advise Judge McBrien "where my line of questioning was going so that we wouldn't end up with a bunch of objections as irrelevant and have to argue about it." (HT 237)

Ms. Huddle testified she found Judge McBrien's comment about law school as demeaning and his voice "was like a parent scolding a child." (HT 238) She felt belittled because her client and other people were present in the courtroom when he made the statement, and "I felt like he was making me look like, you know, I should go back to school or something." (HT 238)

Also at the hearing, Judge McBrien testified he made the comment about law school because "in law school, professors and/or students would explain why they're going through a procedure, as a learning tool," and he was "trying to give a concrete example of what, in fact, was needed. All she needed to do was ask the question." (HT 180) He did not believe the statement was demeaning, but he understood that someone could perceive it as demeaning. (HT 181)

> "It, to me, is not a pejorative comment. It's simply another way of saying, 'move on; we don't need this at this point.' It just—law school is not a negative, quite frankly. Other than the—parts of the law students possibly that are in law school. But just as readily, one could conclude that the comment refers to someone who's a professor at a law school."(HT 205)

The trial continues

The trial continued as Ms. Huddle asked Mr. Minkoff to testify about his physical condition, and then returned to the topic of the fourplex. Mr. Minkoff testified the fourplex was the security against his loan of the down payment to Mr. Carlsson and Mr. Moore, and Mr. Minkoff received only the principal and interest as payment for his loan. (RT 374-375) Mr. Minkoff engaged a contractor and financed the remodeling. Mr. Moore withdrew from the project, Mr. Minkoff was repaid for the loan and interest, and Mr. and Mrs. Minkoff signed over the grant deed to Mr. and Mrs. Carlsson. (RT 378-379)

On cross-examination by Ms. Keeley, Mr. Minkoff testified he met Mr. Carlsson in Mr. Carlsson's capacity as a state employee when the state leased one of Mr. Minkoff's buildings in 1994. Mr. Minkoff conducted business with the state before and after that time, and he regularly dealt with the real estate division of DGS. (RT 383-384) Mr. Minkoff believed that he was repaid slightly more than his principal and interest payments, but he was not sure of the amount because he relied upon the escrow agent's calculations. (RT 382-383)

"[MS. KEELEY.] If Mr. Carlsson testified that you loaned this money from the goodness of your heart, without receiving any benefit from loaning the money, he would be inaccurate?

"A. Well, from the goodness of my heart, yes, I would say at 6 percent it would be out of the goodness of my heart." (RT 383)

At 2:18 p.m., Mr. Minkoff was excused and Ms. Huddle called Pakhtun Shah, a real estate appraiser. Mr. Shah testified extensively about the fair market values of the residence and fourplex, and disagreed with the appraisal methods used by Mrs. Carlsson's expert. (Exhibit 14, p. 418; RT 387-422) Ms. Keeley cross-examined Mr. Shah about his appraisal (RT 422-442), and Mr. Shah admitted he made a mistake in calculating the value but insisted the mistake did not change the property's fair market value. (RT 422-425)

After Ms. Keeley completed her cross-examination of Mr. Shah, the following exchange occurred:

"MS. HUDDLE: Your Honor, is there any way I could get a break to use the ladies' room?

"THE COURT: *You know, you're approaching a mistrial.*

"MS. HUDDLE: I haven't even been able to talk to the gentleman who went to work to get the records you requested. He has returned. I don't know what he has to say.

"THE COURT: Okay. Is that why you're asking for a break?

"MS. HUDDLE: No, I do need to use the ladies' room. We have been here—

"THE COURT: Why don't we take a 5 minute recess, *but I guarantee you, if this is not completed by 4:30, there will be a mistrial.*

"MS. HUDDLE: I have records to get in.

"THE COURT: I didn't estimate the length for the trial.

"MS. KEELEY: Of the records that Ms. Huddle has provided to me today, I have no opposition to them being admitted as exhibits in this matter.

"MS. HUDDLE: *My client is asking me about a mistrial. I need to confer with my client.* I think five minutes I can race down the hall, race back and talk to him—

"MS. KEELEY: If I may ask where we're going? I had hoped for rebuttal testimony by Mr. Sutliffe [Mrs. Carlsson's appraiser]. *There may not be time and I don't want a mistrial,* but I will try to get Mr. Sutliffe organized and ready to go within that five minutes. If we have additional witnesses?

"THE COURT: We'll see you at two minutes to 4:00...." (RT 442-443, italics added)

Hearing evidence about "approaching a mistrial" comment

At the hearing, Judge McBrien testified he told Ms. Huddle that she was approaching a mistrial to raise "the specter of the limited time that they had estimated." He did not believe there had been any breaks since court convened that afternoon. (HT 73) Judge McBrien admitted he said that a mistrial would be declared if the case was not finished by 4:30 p.m.

"Q. So had you ever offered them more courtroom time beyond March 9?

"A. It's not my obligation to do so." (HT 74)

Judge McBrien testified he did not have any recollection of offering the parties more court time beyond March 9, 2006. (HT 76)

Judge McBrien also testified that when he said that a mistrial would occur if the trial was not over by 4:30 p.m., he "intended to convey" that he had no intent of the trial going beyond 4:30 p.m. (HT 77) When Ms. Huddle said she had more records to introduce, Judge McBrien replied that he did not estimate the length of trial. (HT 77)

"Q. So you're telling them here, once their two days is up—they have a two-day estimate. Once they get to the end of that, this is over; right?

"A. A far as I knew, yes.

"Q. Have you ever presided over a trial that took longer than the attorneys estimated it would.

"A. Absolutely.

"Q. Isn't that pretty common?

"A. They have to make a request. And, in fact, I have a Minute Order there from a trial of Ms. Huddle's—

Q. *The question is: Isn't that relatively common, to go over the estimated time period?*

"A. *No, it is not common, but it does happen.*" (HT 77-78, italics added)

At the hearing, Judge McBrien was asked if he threatened mistrials in other cases that went beyond the time estimate. "I couldn't tell you because they occurred in the mid '90s." (HT 78) Judge McBrien had no recollection of using the word "mistrial" when Ms. Keeley called witnesses during Mrs. Carlsson's case-in-chief. (HT 78)

Ms. Huddle testified she asked to use the ladies room because the trial was not proceeding as most hearings. They were not getting the usual breaks, and "everything was very truncated." (HT 240) Ms. Huddle testified that at this point in the trial, she knew she had more evidence to present and assumed "we certainly wouldn't want to retry the entire case just over a small amount of time left to finish the case off," but she did not consider asking Judge McBrien for more time because "I didn't even believe additional time would be acceptable. It was not my impression that Judge McBrien was willing to do anything other than end it at 4:30." (HT 351) She did not ask Ms. Keeley if she could request more time because "[t]hat's just not done." (HT 351)

The trial continues

When the trial reconvened after the recess, Ms. Huddle and Ms. Keeley stated they had stipulated to the admission of Mrs. Carlsson's exhibits. (RT 443-445) Thereafter, the following exchange occurred regarding whether Mr. Carlsson had produced his

Statement of Economic Interest. Apparently, Mr. Carlsson had sent Mr. Mayo to his office to try and retrieve the documents:

> "MS. HUDDLE: Your Honor, would you like me to speak with Mr. Mayo? I have not spoken with him to find out if he, in fact, got anything from the employer.
>
> "THE COURT: That's not my decision.
>
> "(Off the Record Discussion.)
>
> "MS. HUDDLE: For the Court's information, Mr. Mayo went [to] the place of employment and the Supervisor he spoke to said that they would not release any of these forms to him and that they would have to get permission from a different boss in order to get it and that different boss wasn't there today." (RT 445)

Ms. Huddle and Ms. Keeley stipulated as to the division of tax liability and other community liabilities. (RT 445-446) Ms. Huddle stated she agreed to the stipulations because the introduction of such evidence would consume too much time "and may risk a mistrial." (RT 445)

Ms. Huddle asked to recall Mr. Shah to the stand to move his reports into evidence. Ms. Keeley did not object to the admission of the reports. Ms. Huddle also wanted to ask Mr. Shah about an issue in the report. Judge McBrien replied Mr. Shah might be able "to just respond from there frankly." (RT 446) Ms. Huddle apparently asked Mr. Shah additional questions without having him return to the stand, as suggested by Judge McBrien. (RT 446; HT 81-82) Thereafter, Ms. Huddle asked to introduce points and authorities as to the value of the fourplex and Mr. Mayo's partnership claim, and Judge McBrien agreed to accept the document for filing. (RT 447, HT 202, Exhibit 13)

At 4:09 p.m. (Exhibit 14, p. 418; HT 86), Ms. Keeley recalled her appraiser, Mr. Sutliffe, who criticized Mr. Shah's appraisal methods, testified that Mr. Shah's calculation of the fourplex's rental rates was inaccurate, and Mr. Shah's mistake resulted

in an erroneous appraisal by $100,000. (RT 447-455; HT 83) According to the reporter's transcript, Ms. Huddle then conducted "surrebuttal"[12] of Mr. Sutliffe as to why Mr. Shah's calculations were inaccurate. (RT 457-461; HT 84-85) Mr. Sutliffe was excused.

Judge McBrien told Ms. Huddle to "call your witness *while you still have any time.*" (RT 461, italics added; HT 85) At 4:27 p.m. (Exhibit 14, p. 418, HT 86), Ms. Huddle recalled Mr. Shah and asked him to respond to Mr. Sutliffe's criticisms. Mr. Shah admitted he made a mathematical error but it did not substantially change his appraisal of the fourplex, and testified in detail as to different valuation calculations and why his appraisal was more accurate. (RT 461-462)

The EPO call and the end of the trial

As Mr. Shah testified about the different appraisal methods, the following exchange occurred:

> "[MS. HUDDLE:] If you redid your capitalization and your sales market approach—
>
> "THE COURT: Pardon me. I have an EPO. Court is in recess.
>
> "MS. HUDDLE: I think he's just taking an Emergency Protective Order request. Is that it, like a domestic violence, it's his week; right?
>
> "THE CLERK: He's always assigned EPOs.
>
> "THE COURT: *We're going to have to adjourn this. The County operator is on the phone. This trial has ended.*

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[12] As we will discuss, *post*, there is no evidence that Ms. Huddle rested Mr. Carlsson's case on March 9, 2006. (Exhibit 14, p. 418, HT 100, 463) At the hearing, Ms. Joy testified that she used the phrases "rebuttal" and "surrebuttal" in the trial transcript, based upon whether the attorneys said they were calling a witness for those purposes. (HT 401-403) Ms. Keeley testified the parties called witnesses out of order and did not go in order as in a civil trial. (HT 476)

"MS. HUDDLE: Your Honor, I don't even have my client's attorney fees costs put on.

"THE COURT: *Then I'll reserve over that issue or you can get a mistrial, one or the other.*

"MS. KEELEY: We don't want a mistrial. We'll reserve over that issue.

"MS. HUDDLE: But your Honor, the house that we're evaluating—

"(Judge Exits Room)

"MS. KEELEY: We'll arrange another date. Don't panic.

"MS. HUDDLE: Is that what he said?

"MS. KEELEY: I'm going to ask for the him [*sic*] to reserve.

"THE WITNESS: May I go?

"MS. HUDDLE: *Is he coming back? I'm in the middle of my examination.*

"MS. KEELEY: *Ms. Huddle, I'm not prepared for a mistrial.*" (RT 462-463, italics added)

The reporter's transcript states that the proceedings ended at 4:29 p.m., which marked the end of the *Carlsson* trial. There is no indication in the minute order that Ms. Huddle rested Mr. Carlsson's case. (HT 463; Exhibit 14, p. 418)

Hearing evidence about EPO calls and cell phone records

At the hearing, Judge McBrien testified that at the time of the *Carlsson* trial, he was on the rotation to receive telephonic requests from law enforcement officers to issue Emergency Protective Orders (EPO) in domestic violence situations. Judge McBrien carried a mobile telephone on his belt during the trial, and left it on vibrate to know if he was receiving an EPO call.

When he received an EPO call, it was his general practice to adjourn court, explain that he is receiving an EPO call, and go into chambers to take the call "because that's

where the windows are" to get better reception on the EPO cell phone. (HT 88, 100) The county operator will be on the line, and briefly inform him that a peace officer is calling for an EPO. (HT 89) A peace officer then comes on the line, and explains the circumstances surrounding the EPO request. Judge McBrien usually asks a series of questions to substantiate the EPO request. If he decides to issue the EPO, he does so telephonically and the officer at the scene completes the paperwork. (HT 90-91) When he completes an EPO call, he typically returns to the courtroom to explain to the parties what just happened and the proceedings resume. (HT 88-89) He receives EPO calls anywhere from twice a week to four times a day. (HT 100)

At the hearing, the Commission introduced the March 9, 2006, records for Judge McBrien's EPO cell phone. At 4:28 p.m., a call was received on that line and it lasted one minute. (Exhibit 15, p. 169.3; HT 102-103) Judge McBrien testified this call was from the county operator. (HT 103-104) At 4:29 p.m., another call was received on that line and it lasted one minute 53 seconds. (Exhibit 15, p. 169.3; HT 104) Judge McBrien testified this call would have been from the law enforcement officer requesting the EPO. (HT 104)

The records further reflect that at 4:35 p.m., an outgoing call was placed from Judge McBrien's EPO cell phone to his house, and it lasted one minute. (Exhibit 15, p. 169.3; HT 104-105) Judge McBrien testified he did not have an independent recollection of making the telephone call to his house or the subject of the call. (HT 104-105)

Hearing evidence about the end of the trial

In his deposition, Judge McBrien testified that he could not remember the subject of the EPO call he received during the *Carlsson* trial (Exhibit 5, p. 11), but he testified about what happened as a result of that call:

> "I sent a note out with the clerk to inform the people that we're past the time; we have options. One is to reserve an issue if, in fact, it hasn't been completed—basically reserve, mistrial or submit on paperwork. I don't

know if I told them all of that at one time, you know, or through that one note or—I just don't recall particularly. But I mean, I was trying to give them options, recognizing that we were not really going to have a chance to go into session for any substantial period of time that day." (Exhibit 5, p. 13)

Upon further questioning at the deposition, Judge McBrien clarified that he might have given verbal instructions to the clerk instead of a note, and offered the following options to the parties:

"I believe they were a mistrial, reserve over any issue that wasn't—because . . . this was a partial judgment case. This was only a partial judgment that they were even addressing that day. And so the other would have been—let's see. Mistrial, reserve, and submit by paper." (Exhibit 5, pp. 14, 21)

Judge McBrien examined the reporter's transcript of the trial, and testified that he told the parties that "'this trial is over'" because he meant the testimony "at this point in time has ended." (Exhibit 5, p. 16) Judge McBrien testified he did not preclude Mr. Carlsson from completing the testimony of his expert "[b]ecause earlier in the transcript, I had offered them another option." (Exhibit 5, p. 17)

"That was if they wanted to wait, they would not have any priority, but we could schedule them another day. If I was available, they would have that time. And if I was in another trial, that other trial would take precedence." (Exhibit 5, p. 17)

As the deposition continued, Judge McBrien was unable to find the location in the trial transcript when he offered the parties another day of evidence but insisted it was in the record, and that he offered an additional trial day to trail on the calendar. (Exhibit 5, pp. 17-18, 29.)

"Q. Did you give them the option of coming back another day?

"A. I had earlier. I'll have to find that.

"Q. But . . . you said 'the trial has ended.' Those are your words; correct?

"A. Right.

"Q. That doesn't sound like 'this trial has ended unless you want three other dates down the road,' does it? It sounds final, doesn't it?

"A. It does." (Exhibit 5, p. 21)[13]

Judge McBrien testified he was trying to save time for the parties "because I didn't know how long this [EPO] call would take. So I was basically just trying to—you know, didn't want people standing around particularly when we weren't going to be able to return to the trial that day because it was after 4:30." (Exhibit 5, pp. 20-21) Judge McBrien did not return to the courtroom after the EPO call because "there was nobody there—nobody to get input from." (Exhibit 5, p. 22)

Judge McBrien testified that at some point, he instructed his clerk to tell the attorneys they could submit written closing arguments, "anything they wanted to submit, or request for another day." (Exhibit 5, p. 23)

"Q. So did you then, a few minutes later, tell your clerk, 'Tell them they could have another day; that's one of the options'?

"A. I did not at that point. *It was earlier in the transcript that I mentioned that as an option.*" (Exhibit 5, p. 24, italics added)

Judge McBrien testified the trial had to end by 4:30 p.m. that day based upon the parties' estimate that the trial would take two days, and he believed they received their two days. (Exhibit 5, pp. 28-29)

"Q. ... do you always cut off trials right at the time when they have reached the estimate?

"A. No. What I do is typically—and I would have typically done it in this. I would have tried to determine what more, if any, evidence was

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[13] As we explained *ante*, Judge McBrien testified at the hearing that his deposition testimony referred to an exchange on page 149 of the trial transcript, where he offered the parties an additional half-day, which only enabled the parties to have two full trial days, consistent with their trial time estimate, and he did not offer the parties an additional day of trial evidence. (HT 76)

needed to be presented; and if more time were needed, they were welcome to try that option of a day trailing." (Exhibit 5, p. 29)

At the hearing, Judge McBrien testified about the end of the *Carlsson* trial, and when he received the EPO call. He felt the vibration from his mobile telephone and informed the parties that an EPO call was coming in. He started to walk out of the courtroom, he said that court was in recess, and he left the courtroom to take the call. (HT 91-94) Judge McBrien reviewed the trial transcript, and believed he was still talking to the county operator when he briefly returned to the courtroom and said they were going to have to adjourn and the trial had ended. (HT 94-95) Judge McBrien conceded Mr. Shah was still on the witness stand when he left the courtroom. (HT 99)

Judge McBrien testified he did not have an independent recollection of his brief exchange with Ms. Huddle when he advised her to reserve over attorney fees or he would give her a mistrial. (HT 96) He lacked an independent recollection of when he left the courtroom for the last time, but testified that he told the parties that the "evidentiary portion" of the trial was over. (HT 97-98)

"Q. There's not going to be any more testimony in this case; correct?

"A. There's not going to be any more testimony that day in this case.

"Q. *Or any day*?

"A. *I did not state that.*

"Q. Okay. Well, 'This trial has ended' is your statement?

"A. Correct.

"Q. Sounds pretty final, doesn't it?

"A. It sounds that way.

"Q. And you didn't, in fact, allow any additional testimony after this point, did you?

"A. *There was no request for an opportunity to provide additional testimony, at least made to me.*" (HT 98, italics added)

At the hearing, Judge McBrien was asked to address a statement in his October 14, 2008, response to the Commission, where he stated that the *Carlsson* trial ended the way it did because "'all testimony and argument had to be concluded by 4:30.'" (HT 109-110; see 10/14/08 "Notice of Formal Proceedings," p. 4.) Judge McBrien testified "that was the extent of the estimate they had given." (HT 110) He conceded the courthouse was open until 6:00 p.m. and he never inquired whether the attorneys and/or staff could have stayed beyond 4:30 so they could complete the testimony. (HT 110) Judge McBrien testified he took the *Carlsson* matter under submission when he left for the EPO call and adjourned, but conceded he did not do so formally in the courtroom. (HT 614)

Judge McBrien testified neither Ms. Huddle nor Ms. Keeley approached him after March 9, 2006, to ask for additional trial time or advise him of an agreement for a joint request, "[a]nd it surprised me that no one did." (HT 200)

"SPECIAL MASTER CORNELL: At any time did you consider asking the attorneys if they wanted more time?

"[JUDGE MCBRIEN]: I actually considered asking the attorneys what they were doing and concluded that they were running the evidence to 4:30, just to use every bit of time that was readily available, and they would then—they would then decide how they wanted to move forward, whether it was worth their while to try to schedule it for another day, trail possibly. They attorneys generally do not like to do that simply because they have no guaranteed hearing. So all—I did consider all those, but I just thought I'd let them go the way they wanted to go.

"SPECIAL MASTER CORNELL: Did it appear to you they were stringing the evidence out?

"[JUDGE MCBRIEN]: They were. That's what it appeared to me.

"SPECIAL MASTER CORNELL: Both sides?

"[JUDGE MCBRIEN]: A bit." (HT 129-130)

Judge McBrien testified he did not return to the courtroom after he handled the EPO call because "the trial had ended." (HT 106) He conceded the trial ended rather abruptly, but he had no independent recollection of whether he looked into the courtroom to see if anyone was still there. (HT 106)

At the hearing, Judge McBrien was asked to explain his deposition testimony, that he had two responsibilities, to hear the trial and respond to EPOs, and they were not compatible. (Exhibit 5, p. 62; HT 127-128) He testified:

> "They were not compatible because the EPO interfered with our conclusion of the trial in one minute. Partly, there is the expectation that the attorneys are going to comply with the rules and the procedure or ask for more time; and partly, we have the insight or lack of insight of the public, and I think that's what was of some concern to me, who may not know the rules." (HT 128)

Judge McBrien conceded the cell phone records showed the EPO took about three minutes to complete, and insisted his duty to hear the trial was incompatible with dealing with that EPO request. (HT 128)

> "They were [incompatible], because I had already terminated the trial by the time the EPO had concluded. My expectation was that the parties were not waiting for me, but rather were gathering their books, were very likely going to meet and confer, decide how to go forward. Ms. Huddle was going to talk to her client regarding his request for—or his whispering to her for a mistrial. And it was going to take some time for them to figure out how they wanted to go forward." (HT 128-129)

Judge McBrien conceded that when he received the first EPO call, he decided to end the trial "[f]or that day" and he did not return to the courtroom to hear more evidence. (HT 129) He acknowledged that he called his house after completing the EPO calls, and he was sure that he left the courthouse shortly afterwards, although he lacked an independent recollection. (HT 129)

Judge McBrien testified that he could have called a recess to handle the three-minute EPO and then returned to the courtroom, but decided against that:

> "But it could have been one of those 15 or 20-minute EPOs. And I was concerned that we were not going to be hearing more evidence that day; this is costing people money to stand around in court with their attorneys, and there was no real purpose for them to wait, for me, in court for us all to gather again. They still needed to meet and confer. They needed to—Ms. Huddle needed to talk to her client regarding his request for a mistrial, or mumbling. And I think they needed some time." (HT 130-131)

At the hearing, Ms. Huddle testified that around 4:00 p.m. of the last afternoon session, she realized she was not going to finish her case. She did not approach Ms. Keeley and ask for more time because Ms. Keeley did not have "the power to decide when I get extra time or not." (HT 346) She did not ask Judge McBrien for additional time because "I've never known a situation where you have to ask for additional time. A trial just keeps going. . . . The judge is typically the one that does that, not the opposing side." (HT 346) She thought they would be able to continue past 4:30 p.m. that day since she had seen that happen many times. (HT 364)

Ms. Huddle testified that she was asking Mr. Shah about the appraisal when Judge McBrien said he had an EPO and left the courtroom. (HT 256, 272-274) Ms. Huddle assumed Judge McBrien would take the call and then return to the trial, because she intended to call more witnesses. (HT 364) Judge McBrien returned to the courtroom, stood in the doorway behind the bench, and said they were going to adjourn and the trial was over. (HT 257, 259-260) Ms. Huddle testified she tried to tell Judge McBrien that she still had more evidence to introduce, but he left the courtroom. (HT 261-262, 275, 365)

Ms. Huddle testified she stayed in the courtroom with the court reporter, the clerk, Ms. Keeley, the parties, and Mr. Carlsson's friends and relatives, who were in the audience. (HT 262-263) They waited for about 10 to 15 minutes for Judge McBrien to return. She had never seen anything like this happen in a trial. (HT 265) The clerk went back and forth between the courtroom and chambers more than once. The clerk finally

told them the proceedings were over, and Judge McBrien never returned to the courtroom. (HT 266-267)

Ms. Keeley testified that Judge McBrien left the bench to take the EPO telephone call and she did not remember whether he returned. (HT 480) Ms. Keeley believed the parties stayed in the courtroom for ten minutes after he left. (HT 481) When they were off the record, Ms. Keeley heard Ms. Huddle say that she did not get in all her evidence. Ms. Keeley verbally offered that Ms. Huddle could submit a declaration from Mr. Carlsson, and Ms. Keeley waived her right to cross-examination, but Ms. Huddle did not accept the offer. (HT 496)

At the hearing, Ms. Joy, the court reporter, testified Judge McBrien left the courtroom when he received the EPO call. He later "stuck his head around the corner" and said the trial was over but he never resumed the bench. (HT 387-388) Ms. Joy testified the parties, attorneys, and court personnel sat there and wondered what to do because they were never formally dismissed. (HT 389) After about 15 or 20 minutes, Judge McBrien's clerk said he was gone and everyone decided to leave. She had never seen a trial end like that. (HT 390-392)

Hearing evidence about t the Minute Order for March 9, 2006

A typed minute order for the March 9, 2006, session of the *Carlsson* trial, describes the end of the trial:

> "The Court recessed.
>
> "[The Court instructed the clerk to notify Counsel that they may submit a 3 page Brief re: Attorney Fees and a 3 page Closing Brief if they choose by 3/17/06. Clerk verbally gave notice.]" (Exhibit 14, p. 418)

At the hearing, Judge McBrien testified that he did not recall when he instructed the clerk as to the statements in the minute order, but suspected he spoke to the clerk on March 10, 2006. (HT 201, 108, 111) Judge McBrien conceded that while a previous minute order stated that Mrs. Carlsson, the petitioner, had rested her case, there was no

indication in any of the minute orders that Mr. Carlsson, the respondent, rested his case. (HT 100)

Ms. Huddle testified that on the morning of Friday, March 10, 2006, she was in the Ridgeway Courthouse on another case, and the bailiff told her that the clerk from Department 124 wanted to speak with her. (HT 267) Ms. Huddle went to that department and met with Judge McBrien's clerk, Ms. Chesshire. Ms. Chessire informed her that Judge McBrien "said that I had a right to file a closing brief with arguments and a brief about attorney's fees, but there was a page limit on it, and it had to be done by next Friday." (HT 268) Ms. Huddle reviewed the March 9, 2006, minute order, and stated it contained the instructions that Judge McBrien's clerk verbally gave her on March 10, 2006. (HT 269, 365)

At the hearing, the parties stipulated to the admission of the statement given by Judge McBrien's clerk, Ms. Chessire, regarding the end of the trial. (HT 374, Exhibit 40) According to the statement:

> "[Ms. Chessire] doesn't recall the exact sequence after the EPO call came, but knows that the judge ultimately did not return to the courtroom. She knows that at some point when the attorneys were still there she left the courtroom to check on the status. She does not recall if the judge had already left or was still there. If he wasn't there, she would have asked him about the status of the case the following morning. If he was there and gave her instructions for the attorneys, she would have passed on that information to the attorneys that day.
>
> "[Ms. Chessire] doesn't recall when she talked to the judge about the status of the case and what to tell the attorneys. It wouldn't have been by telephone; he never calls her unless he's not coming in because he's sick. She doesn't know for sure when she talked to the attorneys about what the judge wanted them to do." (Exhibit 40)

Ms. Chessire stated her usual practice was to take notes during the proceedings, then prepare the minute order the next day or sometimes the day after. (Exhibit 40) If

she has time during a hearing, she will start the minute order while the proceedings are on going. (*Ibid.*)

> "[Ms. Chessire states she] 'probably' did not prepare the March 9[,] 2006 minute order on March 9. She does not know when she typed in the information in parenthesis on the March 9 minute order, concerning the judge's instructions to the attorneys. The fact that it's in parenthesis indicates to her that she had an 'open' minute order when she typed it in." (Exhibit 40)

Additional hearing evidence about the trial

At the hearing, Ms. Joy, the court reporter, testified about an incident that occurred during a five-minute recess on the second or third day of trial. Ms. Joy testified that Ms. Huddle, Mr. Carlson, and the clerk left the courtroom. Judge McBrien remained on the bench. Ms. Keeley, Mrs. Carlsson, and the bailiff were in the courtroom but the parties were not on the record. (HT 383, 393-395) According to Ms. Joy, Ms. Keeley said, "'She doesn't get it yet, does she?'" Judge McBrien replied, "'She doesn't seem to.'" Ms. Keeley said, "'I guess she doesn't see what's happening here.'" (HT 383)

Ms. Keeley testified she never had an ex parte communication with Judge McBrien. (HT 475)

We find this allegation is not proven.

Judge McBrien testified that he made various statements during the trial to try and move the case along.[14] (HT 206)

> "In my experience with Ms. Huddle, she would never complete her cases within the estimate. And if it's a child custody case, I can understand the complexity and variations that might arise that would create some uncertainty. And, in fact, have on at least two occasions extended the time for the trial. In the case of Barrett, I believe, we went a third—a third day.

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[14] In his deposition, Judge McBrien testified he repeatedly advised Ms. Huddle there would be a mistrial if the case was not finished on time, because "in my experience, Ms. Huddle never completes her work within the time allotted." (Exhibit 5, p. 55)

In the case of Myles, I believe we went two and a half. Both of which had involved custody issues."[15] (HT 206)

Judge McBrien admitted he repeatedly told Ms. Huddle that he would declare a mistrial if she did not finish at a certain time. (HT 178)

"Q. *Initially, you were telling her it would be a mistrial if she didn't finish in a day and a half; right*?

"A. *I was leading her to believe that, yes. Well, I don't know if I was successful, but I was saying it, I guess.*

"Q. Do you feel—in your opinion, did you display impatience with Ms. Huddle at any time during this trial?

"A. Depends on what you mean by 'impatience.' Ms. Huddle has the ability to not necessarily get to the point, and I try to move her along toward the point. So if that's impatience—but I don't believe it was.

"Q. In your opinion, were you ever discourteous to her?

"A. No." (HT 178)

Judge McBrien testified he did not believe that he denied Mr. Carlsson's right to due process and a fair hearing, because the parties had the opportunity to present evidence during the time "they had estimated it would take, and they presented it. They never asked for more time. And it's—under our system, it's their obligation to ask for more time. But they did not." (HT 32) Judge McBrien testified Ms. Huddle never

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[15] As explained *ante*, Judge McBrien introduced evidence that he presided over the *Barrett* trial in 1991, Ms. Keeley and Ms. Huddle represented the opposing parties, the trial was set for two days, he granted the request of one or both parties for a third day, and the trial was completed on that third day. (HT 575-576, Exhibit M) Judge McBrien testified he presided over the *Myles* trial in 1998, Ms. Huddle represented one of the parties, the trial estimate was two days, it involved a very complicated child custody case, Judge McBrien granted the parties' request for more time, but he declared a mistrial after two and one-half days of trial because the case was not closed to being finished. (HT 573-574, 604-606; Exhibit L)

indicated she needed more time, and the clerk's minute orders showed the parties received a total of two court days for the trial. (HT 32, 54-56)

Ms. Keeley testified Judge McBrien "urged both of us to basically get it in gear" during the trial. (HT 475) Ms. Keeley believed Ms. Huddle was "a bit slow" in presenting her case, and Judge McBrien was "[n]ot impatient in a critical way, but he certainly communicated to us that he wanted us to speed things up. Both of us." (HT 493)

Ms. Keeley testified Judge McBrien did not show any anger towards Ms. Huddle, and he was courteous to Ms. Huddle, Mr. Carlsson, and Mrs. Carlsson during the trial. He appeared fair and open to the issues presented to him, and his demeanor was "excellent." (HT 477-478) He directed them to "move things along" because the case "was moving slower than is typical in a family law courtroom, and nobody wants a mistrial." (HT 478)

Ms. Huddle testified that while she initially wanted a continuance in the *Carlsson* trial to consolidate all the fourplex issues, she was ready for trial when the continuance was denied and she was not trying to create a mistrial. (HT 330-332) She did not want a mistrial declared because it would have been very expensive for the parties to "redo the thing all over again," but Judge McBrien kept raising the possibility of a mistrial throughout the trial. (HT 224-225) She described Judge McBrien as being "very impatient" during the trial. (HT 225) Ms. Huddle testified that judges in general don't "make this statement about a mistrial this many times. It's not uncommon for a judge to mention maybe once towards the end of the trial and you're trying to wrap it up and you don't want to go another day. It's not uncommon for the judge to say, 'Well, you know, we don't want a mistrial in this case, do we?'" (HT 226)

> "Usually it doesn't come up until the end of the case where they are trying to wrap it up, and the judge might make the comment to—and it doesn't happen in every case; but on occasion, the bench has said it to make sure

you realize there's a finite amount of time here, to please move on and get things done." (HT 226)

Ms. Joy, the court reporter, testified the trial was "pretty much a push" and "everyone" was working hard to complete the case. (HT 405) Ms. Joy testified that Ms. Keeley and Ms. Huddle comported themselves as professionals. Ms. Joy described Judge McBrien's behavior toward Ms. Huddle as "[d]emeaning," while he "seemed to have an amicable relationship with Ms. Keeley," and he treated Ms. Keeley in a "much more respectful manner." (HT 380, 382) Ms. Joy's opinion was based on Judge McBrien's responses when Ms. Huddle asked for breaks, and when he repeatedly threatened to declare a mistrial. (HT 381) Ms. Huddle was never rude to Judge McBrien. (HT 382) Ms. Joy testified Judge McBrien did not treat her poorly when she reported the trial, but she had never seen a judge behave the way Judge McBrien did toward Ms. Huddle, "not even on television." (HT 382)

PART IV
POST TRIAL EVENTS

We now turn to additional hearing evidence as to what happened after the *Carlsson* trial ended on March 9, 2006.

The Parties' Exchanges after March 9, 2006

Ms. Keeley tried to reach an agreement with Ms. Huddle on several different occasions to submit stipulated statements or offers of proof, so they could avoid a mistrial. Ms. Keeley also sent a letter to Ms. Huddle making such offers. Ms. Huddle, however, never responded to any of Ms. Keeley's offers. (HT 478, 481-482)

On March 13, 2006, Ms. Keeley faxed a letter to Ms. Huddle about her complaint that she had not finished her case. (Exhibit 42)

"If you seek an opportunity for Mr. Carlsson to testify further, I believe Judge McBrien will declare a mistrial. Considering that the court provided us an entire day on Thursday, March 2nd, and a half-day on both March 3rd and March 9th, additional testimony will exceed your two-day trial

> estimate. If a mistrial is declared on account of Mr. Carlsson's insistence on having an opportunity for additional testimony, I believe it very likely that Judge McBrien, who also serves as the law and motion judge in this matter, would grant Mrs. Carlsson a very substantial award of attorney fees." (Exhibit 42, p. 1)

Ms. Keeley offered to enter into a settled statement about the remaining contested issues, and believed Judge McBrien would not object or declare a mistrial if the settled statement was reasonably brief. (Exhibit 42, p. 2)

Ms. Keeley testified that she believed Judge McBrien might declare a mistrial if they asked for more trial time because he had "hurried us along, urged us to get it in gear" several times during the trial, and they had used up their allotted two days of trial time. She thought they would be "skating on thin ice" to ask for more court time, and that's why she suggested a settled statement. (HT 485, 487) Ms. Keeley was trying to avoid a mistrial because of Mrs. Carlsson's limited financial resources. (HT 487, 489)

On March 13, 2006, Ms. Huddle faxed a letter to Ms. Keeley, and proposed a settlement of the entire case in order to avoid a mistrial, appeal or "other horrendous attorney fee expenditures." The settlement offer suggested a complete denial of spousal support, the sale of the fourplex, the awarding of the residence to Mr. Carlsson, and for each party to pay their own attorney fees. (Exhibit 43) Ms. Huddle wrote: "There is very little time to respond or negotiate given the Friday deadline for our briefs, or potential mistrial, so I have not built in any negotiation room." (*Id.* at p. 2.)

Ms. Huddle testified that while Ms. Keeley offered to arrange another court date, she did not accept that offer because Ms. Keeley had no authority to set extra trial dates, and Judge McBrien did not offer additional dates. (HT 353) Ms. Huddle never considered filing a motion to request additional trial time because she believed "[s]uch a request would actually be more damaging to my client." (HT 356) She never considered filing a motion for mistrial. (HT 355) She did not want to risk "the ire" of Judge McBrien, "after being told this is it, I am now back asking for more," and feared her

client would be sanctioned, receive an adverse ruling, or ordered to pay attorney fees. (HT 366, 368)

On March 15, 2006, Ms. Keeley faxed a letter to Ms. Huddle in which Mrs. Carlsson rejected Mr. Carlsson's settlement proposal and made her own settlement offers, which included the award of the residence and fourplex to Mr. Carlsson. (Exhibit 44, pp. 1-2)

Closing Briefs

On March 17, 2006, Ms. Huddle filed a closing brief on behalf of Mr. Carlsson. (Exhibit 18) Ms. Huddle's brief began as follows:

> "Respondent's counsel was verbally noticed and instructed by the court's clerk on March 10, 2006, that the trial in this matter was deemed concluded and no further testimony will be taken. Further, the court clerk stated that the parties were permitted to submit a declaration regarding attorney fees and costs and a closing argument brief with a three (3) page maximum limit. *Respondent objects to this procedure, as Respondent's redirect testimony was not concluded and rebuttal testimony* [*was*] *not allowed.* Respondent submitted several exhibits for which testimony was to be elicited. While Petitioner's counsel graciously agreed to admit the documents without testimony, the testimony regarding the documents, as stated below, would support Respondent's contentions in this case." (Exhibit 18, p. 436, italics added)

Ms. Huddle's closing brief stated that Mr. Carlsson wanted to sell the fourplex, and argued Mrs. Carlsson should not receive any proceeds "based on her breach of fiduciary duty" when she refused to acknowledge Mr. Mayo's partnership interest in the property. (Exhibit 18, p. 437) Mr. Carlsson asked to receive the residence, with the value based on a new, mutually agreed-upon appraisal, and that he would have testified that selling the family residence would traumatize their minor child. (*Id.* at p. 438.) As for his state pension, Mr. Carlsson requested division of the pension pursuant to the time rule, and that he would have testified "that his repayment into his retirement is

mandatory, but that Petitioner has an option when she gets her own account to repay or not." (*Ibid.*)

Also on March 17, 2006, Ms. Keeley filed a closing brief on behalf of Mrs. Carlsson, and requested the sale of the residence. She also requested the court to find the Carlssons were the sole legal and beneficial owners of the fourplex, that Mr. Carlsson's attempt to transfer title to Mr. Mayo was invalid, and to award the fourplex to Mr. Carlsson. (Exhibit 19, p. 540) As to Mr. Carlsson's state pension benefits, she requested the court reserve and divide the community property portion of his pension pursuant to the time rule, and award each party one-half of community property contributions to his deferred compensation plan. (*Id.* at p. 541.) Mrs. Carlsson requested attorney fees of $40,000. (*Ibid.*)

Hearing evidence about the closing briefs

At the hearing, Judge McBrien testified he read the parties' closing briefs prior to ruling on the case, and he was aware of Ms. Huddle's complaint about the abrupt ending of the trial and that she needed more time to introduce evidence. (HT 110-111, 201, 602-603) Judge McBrien testified that if the attorneys had jointly requested more time, he might have granted their request. (HT 111)

> "Q. Did it concern you that an attorney was representing to you that she hadn't been allowed to finish her case, her testimony?
>
> "A. It did.
>
> "Q. So what did you do in response to that concern you had?
>
> "A. *Well, one,* [*she*] *doesn't ask—or doesn't offer a remedy. Namely, more time. So there really wasn't a lot I could do.*" (HT 112, italics added)

Judge McBrien testified he read Ms. Huddle's closing brief and decided the case. (HT 113)

> "Q. So you did nothing in response to her comment about finishing her case; correct?

"A. I did not initiate any contact with the attorneys regarding what they wanted to do." (HT 113)

At the hearing, Judge McBrien testified that he decided to order the sale of the properties "once I'd heard all the evidence," which included the parties' closing arguments, and he conceded that the value of both properties was still a relevant issue on March 9, 2006, when he left the courtroom to accept the EPO call. (HT 115)

Judge McBrien's Tentative Decision

On March 22, 2006, Judge McBrien issued a three-page tentative decision in the *Carlsson* dissolution. It was handwritten on minute order forms.[16] (Exhibit 21; Exhibit G)

Judge McBrien awarded each party half of the community interest in Mr. Carlsson's retirement and did not order a segregated account. (Exhibit 21, p. 403) Judge McBrien awarded spousal support to Mrs. Carlsson and rejected Mr. Carlsson's argument that she was underemployed. (Exhibit 21, p. 404) As for the real properties, Judge McBrien acknowledged the parties disputed the fair market values, but ordered the sale of both the residence and the fourplex. (*Id.* at p. 405.) As to attorney fees, Judge McBrien noted that some of the fees might be attributed to Mr. Carlsson's decision, on the eve of trial, that he no longer wanted the fourplex awarded to him. Judge McBrien found that if Mr. Carlsson's decision had been revealed earlier, the parties could have arranged for the sale of the fourplex, instead of obtaining competing appraisals and requiring substantial trial time. Based upon the parties' respective abilities to pay and "in part on this change of desire" of Mr. Carlsson, Judge McBrien awarded $35,000 in attorney fees to Mrs. Carlsson. (*Id.* at p. 405.)

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[16] At the hearing, Judge McBrien testified that only Sacramento County had family law judges fill out minute orders, for both law and motion matters and trials, and identified the handwriting as his own. (HT 42)

Hearing evidence about the tentative decision

At the hearing, Judge McBrien testified he drafted the tentative decision after he reviewed the pleadings, his trial notes, and the entire file, including the parties' post-trial briefs. (HT 201, 561-562) Judge McBrien disagreed that he entered judgment in favor of Mrs. Carlsson on the majority of the issues. (HT 119) Judge McBrien testified that he did not order a segregated account for the division of Mr. Carlsson's state retirement benefits because Mrs. Carlsson provided the only trial evidence on that topic, that she did not want a segregated account, Ms. Huddle did not cross-examine her on that issue, and Mr. Carlsson did not offer any contrary testimony. (HT 117-119, 562-563, 601)

Judge McBrien testified he decided to award spousal support to Mrs. Carlsson because Mr. Carlsson made twice her income. Mrs. Carlsson's evidence showed she worked full time, and he rejected Mr. Carlsson's argument that she was underemployed. (HT 122-123, 566-567)

Judge McBrien testified he found the Carlssons were the only title holders to the residence and fourplex, and ordered the sale of both properties. (HT 123-124, 568)

> "First of all, nobody wanted the—the four-plex. And secondly, I was aware that Mr. Carlsson wanted the house. However, he presented no evidence to suggest that he qualified for any—or had any ability to buy out Mrs. Carlsson. And so I really didn't want to put the parties in a position of limbo where I make an order awarding it to Mr. Carlsson but he really couldn't qualify for the loan or to buy out her interest in it. So I figured that by doing that, by ordering it sold, certainly if it was still Mr. Carlsson's desire to obtain the house, that they would be able to get to a point of an amount, in a descending market, that would be—that both would feel fair and that he could qualify for a loan on. And the testimony indicated that the house was going down in value, and the duplex was holding its own simply because commercial or rental property at the time hadn't yet started tanking." (HT 568-569)

Judge McBrien testified Mr. Carlsson failed to present any evidence that Mrs. Carlsson agreed to the partnership agreement with Mr. Mayo. (HT 202-203)

Judge McBrien testified he awarded attorney fees to Mrs. Carlsson for several reasons. (HT 124, 569)

> "First of all, Mr. Carlsson made significantly more money, more than two times the amount that Mrs. Carlsson made. Secondly, we had spent probably, I want to say, a third of the trial dealing with this third-party interest in this property, and there was no way that I could adjudicate that without the third party present. [¶] ... [¶] And also, I was a little concerned about the changes in position. Not from the perspective of it's fair to change or unfair to change your position; it's fine to change your position. But one of the points that was brought to my attention during the trial was that Mrs. Carlsson had two appraisals on both the house and the four-plex, one six months earlier and one a month before the trial. And in an effort to try to reach some agreement regarding the times—or the price, you know, the price that it would be valued—and that's where I determined that the price of the house, of the family residence, was falling. And then in the—I had indicated early on, when they had both indicated they didn't want her—actually, Mr. Carlsson had indicated he did not want the four-plex, that we could address simply the issue of attorney's fees for the need to get that extra appraisal at a later point, if they were willing to agree to sell the four-plex, which would have reduced immensely the amount of time spent in the trial on that issue. But I—then I sent the attorneys off to discuss it, but no agreement was reached." (HT 569-571)

Judge McBrien's Statement of Decision

On March 29, 2006, Ms. Huddle filed objections to the tentative decision on Mr. Carlsson's behalf. He objected to the court's rulings on child and spousal support, the failure to segregate the pension benefits, the sale of the residence, the award of attorney fees to Mrs. Carlsson, and the failure to find that Mrs. Carlsson breached a fiduciary duty and committed fraud by refusing to transfer a partnership interest to Mr. Mayo. (Exhibit 22, pp. 551-553; Exhibit H)

On March 30, 2006, Judge McBrien issued a handwritten minute order and overruled Mr. Carlsson's objections to the tentative decision, except to clarify that a final child support order would not be issued until custody was resolved. In all other respects, Judge McBrien adopted the tentative decision as the statement of decision. (Exhibit 23)

Hearing evidence about the Statement of Decision

At the hearing, Judge McBrien testified he reviewed Mr. Carlsson's objections to the tentative decision, and adopted the tentative decision as the Statement of Decision except for the child support issue. (HT 125) He conceded that when he made the final ruling, he was aware that Mr. Carlsson objected to the termination of the trial, and that some of the proposed testimony might have been relevant to the contested issues. (HT 125)

> "Q. Do you see a problem with making a ruling under those circumstances?
>
> "A. It's their obligation to ask for more time if they want more time." (HT 126)

PART V
JUDGE MCBRIEN'S REQUEST AND THE TRANSMISSION OF THE TRANSCRIPT OF MR. CARLSSON'S TESTIMONY

As set forth *ante*, on March 3, 2006, Mr. Carlsson was extensively cross-examined by Ms. Keeley as to his relationship with Mr. Minkoff. Also, Judge McBrien, on his own, made a request that day for Mr. Carlsson to produce his Statements of Economic Interest from 2001 to 2004, but Mr. Carlsson was unable to produce the documents during the trial.

As we will explain *post*, it is undisputed that Judge McBrien obtained a partial transcript of this portion of Mr. Carlsson's trial testimony after three requests. Judge McBrien then sent that transcript to Mr. Carlsson's employer, the state's DGS. The hearing evidence reveals the following sequence of events.

Judge McBrien's first request for the transcript

At the hearing, Judge McBrien testified that at some point after Mr. Carlsson's trial testimony of March 3, 2006, Judge McBrien asked his court clerk to have the court

reporter prepare a partial transcript of Ms. Keeley's cross-examination of Mr. Carlsson. (HT 156)

> "Q. Why did you want that?
>
> "A. I wanted to ensure that what I thought I had heard, I had actually heard.
>
> "Q. What was it that you thought you heard?
>
> "A. I thought I heard the admission of the violation of the FPPC rules.
>
> "Q. *So you wanted the document to determine—or help determine whether Mr. Carlsson had violated the law*?
>
> "A. *No. I wanted to double-check what I thought I had heard to ensure that I heard—accurately heard that.*
>
> "Q. And you needed that to help you make a decision in the case?
>
> "A. Well, I think that was—would be helpful to know. If, in fact, I had misheard that information, this whole pursuit of the Statement of Economic Interest may have been irrelevant. As it turns out, I never received the Statement of Economic Interest."[17] (HT 156-157, italics added)

Judge McBrien did not recall what he said to his clerk when he asked for the transcript, just that he wanted Mr. Carlsson's cross-examination testimony "to ensure that I actually heard what I did think I heard." (HT 158)

> "Q. When you asked your clerk to get the transcripts, *did you tell her that the attorneys should not be informed about the request?*
>
> "A. *I have no—I'm fairly certain I wouldn't do that, but I have no recollection.* [¶] ... [¶]
>
> "Q. Is this request of the transcript something you would want the attorneys to know about?

---

[17] In his deposition, Judge McBrien testified he asked for the transcript of Mr. Carlsson's testimony about Mr. Minkoff because "it smelled. And I was trying to ensure that it actually was an odd dealing, and I hadn't misheard anything." (Exhibit 5, pp. 44-45)

"A. I would assume they would get a copy of whatever it is I requested." (HT 158-159, italics added)

Judge McBrien did not know when he made the first request for the partial transcript, or whether the request was made after the trial concluded on March 9, 2006. (HT 157) He reviewed Exhibit 17, the partial transcript of Mr. Carlsson's cross-examination testimony of March 3, 2006, prepared by Ms. Joy, the court reporter, who did not sign the transcript but certified it March 10, 2006. He conceded his first request was made sometime between March 3 and 10, 2006. (HT 158, 159; Exhibit 17, p. 123)

Ms. Joy, the court reporter, testified that Judge McBrien's clerk approached her at some point during a break in the trial (HT 407, 427), and said Judge McBrien wanted the particular portion of the March 3, 2006, transcript that dealt with Mr. Carlsson's employment, "'and he instructs you not to tell anyone.'" (HT 384) Ms. Joy testified that shortly after the conversation with the clerk, she approached both Ms. Huddle and Ms. Keeley in the lobby and told them exactly what the clerk asked her, and asked if they also wanted copies of the transcript. (HT 385) Ms. Joy could not recall their reactions or if they asked for copies. (HT 408-409) Ms. Joy testified she had never received such a request from any judge before. (HT 385) Ms. Joy only spoke to the clerk and never spoke to Judge McBrien. (HT 407)

Ms. Joy testified she transcribed the requested portion of the transcript that evening. She sent it the next day to Linda Lucky, the court coordinator in the administrative office, and directed it to Judge McBrien's department. (HT 385, 386, 406-407, 411; Exhibit 17) Ms. Joy believed the clerk requested the transcript on March 9, 2006, and she sent it to the administrative office on March 10, 2006. (HT 426-427)

In her statement admitted at the hearing, Ms. Chessire, Judge McBrien's courtroom clerk, addressed the first request for the transcript:

"[Ms. Chessire] recalls the judge asking to ask the court reporter for a partial transcript. She doesn't recall his exact words, but does not recall the

judge telling her not to tell the attorneys that he had asked for a transcript, or any words to that effect. She 'can't imagine' that he would say something like that. She thought that it was like a read back situation, where the judge wanted to review the testimony, but did not need something 'official and bound.'" (Exhibit 40)

In his deposition, Judge McBrien was asked if he gave instructions that the reporter could not tell the attorneys he wanted the transcript. Judge McBrien testified: "Not to my recollection." (Exhibit 5, p. 46.)

"Q. Is it possible that you told the clerk, 'let the reporter know that the attorneys shouldn't hear about this'? [¶] ... [¶]

"[A.] Anything is possible. [¶] I don't quite understand why anybody would do that, but . . ." (Exhibit 5, p. 47)

Judge McBrien testified he would have expected the attorneys to know about the request because they would have received a copy of the transcript. (Exhibit 5, p.47)

We find the allegation is not proven.

The second request for the transcript

While Judge McBrien requested the transcript sometime between March 3 and 10, 2006, it is undisputed that he did not receive the transcript at that time. He issued the Statement of Decision on March 30, 2006, before he received the transcript. (HT 159)

Judge McBrien testified that he believed that he asked for the partial transcript again in May 2006, because some procedure had not been followed and "we needed to make a formal request through the Court system for a copy of the transcript." (HT 159-160) Judge McBrien reviewed (HT 160) a hand-written minute order, entitled, "Request for Partial Transcript," which stated:

"The court requests a partial transcript of the proceeding to include Respondent[']s testimony only given on this date." (Exhibit 25, p. 165)

The minute order was signed by Judge McBrien. (Exhibit 25, p. 165) There is a date stamp for "May 12 2006" at the bottom of the minute order. (*Ibid.*) Ms. Joy's name and

address is written at the bottom of the page, and Ms. Chessire, the courtroom clerk, also signed the minute order. (*Ibid.*)

Judge McBrien did not have an independent recollection of making a second request for the transcript. (HT 165) He acknowledged, however, that the minute order with the May 12, 2006, date stamp represented a formal request for the transcript, and it "sound[ed] reasonable" that the minute order reflected that his second request for the transcript was made on that date. (HT 160)

"Q. So why did you want the transcripts at this time?

"A. *It was really more follow-up out of curiosity. I was curious what had happened to the transcript.*

"Q. So are you saying you didn't particularly want the transcript anymore?

"A. *I didn't—if it had never come, I wouldn't have been particularly upset."* (HT 161, italics added)

Judge McBrien agreed that on May 8, 2006, Ms. Keeley filed a motion on behalf of Mrs. Carlsson. The motion sought the entry of the judgment, an order compelling Mr. Carlsson to execute a listing agreement for the sale of the family residence and the fourplex, and attorney fees. The motion alleged Mr. Carlsson was not complying with the court's previous order to sell both properties. (Exhibit 24, pp. 567-568; HT 161-162) Judge McBrien set the hearing for June 20, 2006. (Exhibit 24, p. 567, HT 164)

"Q. Could that [motion] be why you made the second request to get the transcript?

"A. No. Totally unrelated.

"Q. So at this point, it was just curiosity?

"A. I believe that the Minute Order was brought—was given—the Minute Order with the formal request for the transcript was a procedure that the Court possibly told my clerk needed to be done in order to get the transcript. In other words, there apparently had been some oral request at

an earlier point, but accounting and other procedures needed to be followed that eventually resulted in that Minute Order that—my only involvement in that Minute Order was signing it.

"Q. But you signed [the minute order] for a reason; right?

"A. I signed it because I made the request sometime earlier, yeah." (HT 162-163)

Judge McBrien testified that Mrs. Carlsson's May 8, 2006, motion would have been filed with the clerk's office, which would have affixed his signature with a stamp. (HT 163) Judge Carlsson would not have seen Mrs. Carlsson's motion until about a week before the scheduled hearing of June 20, 2006. (HT 164)

At the hearing, Ms. Joy, the court reporter, testified that about three weeks after the trial, Judge McBrien's clerk called and said they never received the transcript that was previously requested. Ms. Joy sent another copy directly to Judge McBrien's chambers. (HT 384-386, 411)

Post-trial motions

In early June 2006, Ms. Huddle filed an ex parte motion to withdraw as Mr. Carlssons's attorney. Judge Robert Hight granted the motion, and Ms. Huddle did not represent Mr. Carlsson again in this case. (HT 290, 359-360, 459)

On June 20, 2006, Judge McBrien continued Mrs. Carlsson's pending OSC motion to July 10, 2006. (Exhibit 24, p. 664)

On July 10, 2006, Judge McBrien conducted the hearing. Ms. Keeley represented Mrs. Carlsson, and Mr. Carlsson represented himself. (Exhibit 26, p. 665) Judge McBrien granted the motion. He ordered the entry of judgment, and ordered each party to execute a listing agreement for both properties, with the residence at $615,000, and the fourplex at $599,900; if either party refused to execute the listing agreement, the clerk of the court would sign the listing agreement. (Exhibit 26, p. 665; Exhibit 30, p. 790)

On July 15, 2006, the judgment of dissolution was filed consistent with the tentative decision. (Exhibit 27) On July 24, 2006, the clerk of the court executed listing agreements for both the residence and fourplex. (Exhibit 30, p. 790)

On August 18, 2006, Judge McBrien filed the findings and orders after the July 10, 2006, hearing on Mrs. Carlsson's motion, which designated the listing agents and prices for the residence and the fourplex, and ordered the parties to cooperate in the sales. (Exhibit 28)

On August 24, 2006, Mr. Carlsson filed a notice of appeal from Judge McBrien's judgment of dissolution. (Exhibit 29)[18]

On September 6, 2006, Ms. Keeley, on Mrs. Carlsson's behalf, filed another motion asking the court to compel Mr. Carlsson to cooperate in the sale of the fourplex, and sign all appropriate contracts and escrow documents; she also sought attorney fees. (Exhibit 30) Mrs. Carlsson declared that an offer was made to purchase the fourplex for $575,000, but Mr. Carlsson refused to accept the offer or communicate with the real estate agent. (Exhibit 30, p. 790) Mrs. Carlsson declared that Mr. Carlsson made it difficult for the real estate agent to market the residence, he allowed the residence's swimming pool to deteriorate from lack of maintenance, and he removed the "For Sale" sign from the property. (Exhibit 30, p. 792)

On September 6, 2006, Judge McBrien set Mrs. Carlsson's motion for a hearing on September 20, 2006, and ordered Mr. Carlsson to comply with temporary orders to produce immediately all documents required to complete the sale of the fourplex, to sign

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[18] Mr. Carlsson was represented by attorney Brendon Ishikawa on appeal. (Exhibit 29) At the hearing, Ms. Huddle testified that during her representation of Mr. Carlsson, she retained Mr. Ishikawa to draft points and authorities on various pre- and post-trial matters. (HT 279, 323-324) Also at the hearing, Judge McBrien testified he did not know about Mr. Carlsson's appeal until the Third District Court of Appeal published the opinion in 2008, which reversed the judgment. (HT 178)

all contracts and escrow documents, and hire a service to maintain the swimming pool at the residence. (Exhibit 30, pp. 782, 788)

The third request for the transcript

Judge McBrien testified he still did not receive the partial transcript of Mr. Carlsson's cross-examination testimony after the second request was made in May 2006. (HT 164) He had no recollection of making a third request for the transcript, but testified that he finally received the transcript some time in September 2006. (HT 165-166)

Ms. Joy, the court reporter, testified that she received a telephone call from Judge McBrien's clerk around September 2006. The clerk said they never received the transcript, and asked Ms. Joy to email it to the clerk's email address. Ms Joy complied with the request and emailed the transcript to the clerk. (HT 385-386, 414-415; Exhibit 17)

While Ms. Chessire, Judge McBrien's clerk, filed a statement in this matter, her statement did not address the second and third requests for the trial transcript. (Exhibit 40)

Judge McBrien sends the transcript to Mr. Carlsson's employer

At the hearing, Judge McBrien testified the trial evidence showed that Mr. Minkoff had a lender's interest in the fourplex from 2002 to 2004, he was paid off in 2004, and he still had a $16,000 note on the family residence at the time of the 2006 trial. (HT 204-205)

> "Q. Is that what caused you concern with respect to the Fair Political Practices Act disclosures?
>
> "A. That, plus the fact that Mr. Carlsson worked for the State and Mr. Minkoff leased property to the State." (HT 205)

Judge McBrien testified that when he finally received the transcript, he read Mr. Carlsson's cross-examination testimony and he had "the overlying concern as to whether or not Mr. Carlsson had violated the FPPC rules" by not disclosing his business

relationship with Mr. Minkoff. (HT 166) Judge McBrien believed the transcript might contain some evidence of improper activity by Mr. Carlsson. (HT 171)

"Q. So what did you do with the transcript after you read it?

"A. Well, I discussed with some other judges, and had been discussing with some other judges throughout this time, this circumstance. And I think that I concluded—*or we concluded that, at this point, just send it to the FPPC—rather, to the General Services, since nobody knew anybody at the FPPC, and let them deal with it.*" (HT 166-167, italics added)

Judge McBrien testified he had been thinking and talking about the issue for some period of time prior to receiving the transcript of Mr. Carlsson's testimony, and continued to consider the issue after he received it. (HT 167)

"Q. Why were you still concerned with that issue?

"A. *I believe that a judge has an obligation to report any potential violation of the law.*

"Q. But you said you don't know whether or not you actually ordered the document?

"A. *I did order the document sometime, I presume, in March.*

"Q. . . . You told us you don't know if you actually requested the document the third time in September?

"A. *I don't believe that I requested the document a third time in September. I believe it eventually got to me, but I don't have any recollection.*

"Q. But leading up to receiving it, you're considering this issue, wondering what to do?

"A. I was." (HT 167-168, italics added)

Judge McBrien testified he never had reported a litigant or attorney for possible criminal activity in any case, except for a response to a State Bar inquiry about an attorney who failed to appear. (HT 168-169, 615) In prior dissolution cases, he had received conflicting evidence between a witness's testimony about income and that

party's tax return, but he usually accepted the tax return as truly reflective of the party's situation. (HT 616)

Judge McBrien testified he consulted with Judges Hight and Sumner about the matter, and Judge Sumner knew that Linda Cabatic was the general counsel for Mr. Carlsson's employer, the state's DGS. Judge McBrien had a passing recognition of Ms. Cabatic from their joint service in the Attorney General's office in the late 1970s and early 1980s. He decided to send the transcript of Mr. Carlsson's testimony to Ms. Cabatic. (HT 169-170)

Judge McBrien testified he obtained Ms Cabatic's telephone number from Judge Sumner. Judge McBrien called Ms. Cabatic and asked for her fax number. Ms. Cabatic wanted to know what it was about, and Judge McBrien replied that "it might be something about reporting. And I faxed it."[19] (HT 170) He did not send the transcript to the FPPC.[20] (HT 170-171, 165-166)

At the hearing, it was stipulated that in September 2006, Judge McBrien placed a telephone call to Linda Cabatic, the deputy director and chief counsel for the legal services division of the state's DGS; that Judge McBrien said "words to the effect that a DGS employee had testified in court and that he was concerned about the testimony in connection with disclosure of a reporting issue. The judge said he would fax the transcript that day." (HT 254-255)

On September 11, 2006, Judge McBrien faxed the transcript of Mr. Carlsson's cross-examination testimony to Ms. Cabatic. (HT 170-171, 165-166; Exhibit 2, p. 38)

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[19] In his deposition, Judge McBrien testified he said "[a]s little as possible" to Ms. Cabatic about the transcript, just that "it may have something to do with some reporting." (Exhibit 5, p. 49)

[20] In his deposition, Judge McBrien testified he sent the transcript to DGS and not the FPPC because "I know nobody at the FPPC." (Exhibit 5, p. 50)

Judge McBrien continues to preside in the *Carlsson* case

When Judge McBrien faxed the transcript to Ms. Cabatic on September 11, 2006, there was a pending motion filed by Mrs. Carlsson on September 6, 2006, to compel Mr. Carlsson to cooperate in the sale of the fourplex, maintain the swimming pool at the residence, sign all appropriate contracts and escrow documents, and for attorney fees. Judge McBrien had set the hearing on the motion for September 20, 2006. (Exhibit 30; HT 173-174)

> "Q. Don't you think you should have either gotten off the case at that point or at least disclosed what you had done to the parties?
>
> "A. *At that point, I didn't know whether that was disclosing any particular information to the employer that the employer didn't already have through an FPPC report that included information regarding this relationship. So at that point, I didn't believe there was a problem.*" (HT 171, italics added)[21]

Judge McBrien was asked whether an objective observer would believe he was still fair and impartial after he requested the transcript and sent it to Mr. Carlsson's employer as possible evidence of criminal activity. (HT 171-172)

> "Only if the judge believes the testimony from Mr. Carlsson that, in fact, he didn't have to—he didn't have to include this. And quite frankly, I had the opportunity to observe Mr. Carlsson's demeanor at that time and did not believe that he was truly aware of what he was including and not including. In fact, he testified that he had his secretary fill it out and all he did was affix a signature." (HT 172)

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[21] In his deposition, Judge McBrien testified he sent Mr. Carlsson's transcript to Ms. Cabatic because "I couldn't determine anything from it, so I sent it to General Services ... for them to make any determinations that needed to be made." (Exhibit 5, p. 48) He thought the transcript was relevant to Mr. Carlsson's employment because "it appeared that there was some violation [of law] that Mr. Carlsson was admitting." (Exhibit 5, pp. 48, 50-51)

On September 14, 2006, Ms. Keeley, on Mrs. Carlsson's behalf, filed another motion. This one sought to increase the child support award because of changed circumstances, to pay the attorney fees pursuant to the court's prior orders, and to award attorney fees for the pending appeal because she had exhausted all her resources.

She further declared a hearing was held on Mr. Mayo's pending lawsuit. Mr. Carlsson appeared at the hearing and opposed Mrs. Carlsson's motion to expunge the lis pendens filed against the fourplex.[22] (Exhibit 31, pp. 839-840) On the same day, a hearing was set on the motion for October 25, 2006; Judge McBrien's signature was stamped on the order. (Exhibit 31, p. 835)

On September 20, 2006, Judge McBrien conducted a hearing on Mrs. Carlsson's motion that was filed on September 6, 2006, for an order that Mr. Carlsson cooperate in the sale of the properties. Ms. Keeley represented Mrs. Carlsson; Mr. Carlsson was represented by attorney Margaret Shannon. (HT 174-176; Exhibit 32, p. 847) Judge McBrien granted the motion and ordered the courtroom clerk to sign the listing for the fourplex. He set a hearing to review the sale of the residence, and ordered Mr. Carlsson to pay Mrs. Carlsson's attorney fees. (Exhibit 32, p. 847)

On October 10 and 25, 2006, Judges Winn and McBrien, respectively, continued the hearing on Mrs. Carlsson's motion that was filed on September 14, 2006, to November 2006. (Exhibit 33, pp. 859-860)

At the hearing, Judge McBrien testified that when he faxed the transcript to Mr. Carlsson's employer, he suspected Mr. Carlsson engaged in improper conduct but he did not know for sure. (HT 172) He conceded that he did not disclose his actions to the

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[22] At the hearing, Ms. Keeley testified that another attorney represented Mrs. Carlsson in the lawsuit filed by Mr. Mayo, but she knew that Mr. Mayo's lawsuit was subsequently dismissed with prejudice, and Mr. Mayo was ordered to pay $5,000 in attorney fees to Mrs. Carlsson. (HT 471-472, 503)

parties, he did not recuse himself from the Carlsson case, and he continued to hear motions in the case. (HT 173)

> "[T]oday, I'd hear a case with either attorney. I don't believe I do have a bias that would require my recusal from hearing one for—a case from either attorney. [¶] . . . [T]here are no attorneys in Sacramento County that I would not be willing to hear a case from." (HT 616-617)

In his deposition, Judge McBrien was asked to explain a statement in his response to the Commission, where he wrote that in retrospect, he should have recused himself from the Carlsson case on September 11, 2006, when he faxed Mr. Carlsson's transcript to Ms. Cabatic. (Exhibit 2, p. 38; Exhibit 5, p. 51) Judge McBrien testified at his deposition that he made that statement because "by that time, I had known that adverse action had been taken. It wasn't until I heard that adverse action was taken against Mr. Carlsson and then, once I heard that, I disqualified myself." (Exhibit 5, pp. 51-52)

Also in his deposition, Judge McBrien testified he did not recuse himself from the *Carlsson* case after he sent the transcript to Mr. Cabatic, because "I didn't have enough facts to make that determination." "If . . . his Statement of Economic Interest had disclosed this relationship and this four-plex, there would be no reason for me to disqualify myself. It's only in the absence of disclosure that I needed to disqualify myself, where they might take action." (Exhibit 5, p. 51)

Judge McBrien disqualifies himself from the Carlsson case

On November 7, 2006, Judge McBrien disqualified himself from the *Carlsson* case pursuant to Code of Civil Procedure section 170.1. (Exhibit 2, p. 38) He made this decision after he gave "the matter some thought" and learned the state's DGS took disciplinary action against Mr. Carlsson. (Exhibit 2, p. 38)

Disciplinary action against Mr. Carlsson

As explained *ante*, Judge Carlsson called Ms. Cabatic, general counsel for his employer, DGS, and faxed the transcript of Mr. Carlsson's testimony to her on September

11, 2006. After Ms. Cabatic received the transcript, she assigned the matter to a staff counsel. (HT 255)

The state's DGS subsequently filed a Notice of Adverse Action and dismissed Mr. Carlsson from his employment. (Exhibit A, p. 1.) In March and April 2007, an administrative law judge presided over hearings before the State Personnel Board. In December 2007, the Board sustained the decision of the state's DGS to dismiss Mr. Carlsson from his employment. On January 8, 2008, the State Personnel Board adopted the Administrative Law Judge's findings and upheld Mr. Carlsson's dismissal, based upon his willful failure to disclose his joint ownership of the fourplex with Mr. Minkoff in his Statement of Economic Interest, and that the nondisclosure occurred during a period when Mr. Carlsson was overseeing amendments to a lease entered into between Mr. Minkoff and the DGS. (Exhibit A, pp. 1, 2, 5-6, 12-16)

The Third District's Reversal of Judge McBrien's judgment in *Carlsson*

On May 8, 2008, the Third District filed the published opinion in Mr. Carlsson's appeal and reversed Judge McBrien's judgment in the dissolution trial. (Exhibit 34; *In re Marriage of Carlsson* (2008) 163 Cal.App.4th 281.)[23] In doing so, the court did not find any aspect of Judge McBrien's ruling was erroneous. Instead, the court concluded that Judge McBrien violated Mr. Carlsson's due process right to a fair hearing when he "suddenly declared an end to the trial before [Mr. Carlsson] had finished putting on his case-in-chief. After displaying impatience and reluctance in allowing the parties

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[23] At the hearing, Judge McBrien testified he did not know Mr. Carlsson had filed a notice of appeal until the Third District reversed the judgment in 2008. (HT 178) Mrs. Carlsson's motion of September 14, 2006, sought attorney fees to pay for Mr. Carlsson's pending appeal. (Exhibit 31, pp. 839-840.) While that motion was set for a hearing, the matter was continued, Judge McBrien disqualified himself, and there is no evidence that he ruled on, acquired knowledge of, or saw the contents of her motion for appellate attorney fees prior to his disqualification.

adequate time to complete their presentations, [Judge McBrien] ended the trial while an expert witness for [Mr. Carlsson] was on the witness stand and counsel was in the midst of asking him a question." (*In re Marriage of Carlsson, supra*, 163 Cal.App.4th at p. 284.) The court further held:

> "[Judge McBrien] essentially ran the trial on a stopwatch, curtailing the parties' right to present evidence on all material disputed issues. Using the constant threat of a mistrial, Judge McBrien pressured Attorney Huddle into rushing through her presentation and continuing without a break. Despite his avowed, compelling need for brevity, the judge himself frustrated the trial's progression with a sua sponte order that [Mr. Carlsson] produce documents which, as the judge conceded, were not relevant to the issues before it. Most damning, the judge abruptly ended the trial in the middle of a witness's testimony, prior to the completion of one side's case and without giving the parties the opportunity to introduce or even propose additional evidence. This was reversible error." (*Id.* at p. 292.)

The court concluded that by "arbitrarily cutting off the presentation of evidence, Judge McBrien rendered the trial fundamentally unfair" and violated Mr. Carlsson's due process right; such errors infected "the integrity of the trial" and required reversal "without regard to an assessment of actual prejudice. [Citation.]" (*In re Marriage of Carlsson, supra*, 163 Cal.App.4th at p. 294.) The court vacated the judgment, remanded the matter for a new trial, and directed the assignment of the case to a different judge. (*Ibid.*)

In his deposition testimony, Judge McBrien stated he did not believe that he denied Mr. Carlsson's due process rights but he respected the Third District's conclusion. (Exhibit 5, p. 35)

PART VI
THE COMMISSION'S PROCEEDINGS

On January 17, 2007, Judge McBrien was informed that the Commission on Judicial Performance had ordered a preliminary investigation regarding his conduct in the *Carlsson* trial on the following matters: (1) the abrupt end of the trial when he left the

courtroom to take the EPO call; (2) his alleged threats to Ms Huddle that she would be held in contempt if Mr. Carlsson failed to produce his Statement of Economic Interest, when the documents were irrelevant to the pending trial; (3) his request for the partial transcript of Mr. Carlsson's cross-examination testimony about his business relationship with Mr. Minkoff, and his alleged instruction to the clerk to tell the court reporter not to inform the attorneys about the request; (4) his sending the transcript to Mr. Carlsson's employer and continuing to preside over matters in the dissolution action; (5) his failure to disclose his actions to the parties; and (6) his discourteous toward and displayed bias against Ms. Huddle based on his repeated threats of declaring a mistrial and other derogatory remarks. (Exhibit 1, pp. 31-32)

The response filed by Judge McBrien's attorney

On March 7, 2007, Judge McBrien's attorney, James Murphy, responded by letter to the Commission's preliminary investigation notice. (Exhibit 2, p. 35) As to the abrupt end of the trial, Mr. Murphy stated that Judge McBrien left the courtroom to take the EPO call, "but he was apparently prevented" from returning to the courtroom after handling the matter "because of the nature of the EPO request," and asked his clerk to advise the parties that "the case was concluded when it become apparent to him that he would not be able to return to preside over the proceedings before the end of the day." (Exhibit 2, p. 36) Mr. Murphy noted the EPO call was made at 4:29 p.m., "which would be very close to the conclusion of the third and final day of trial." (Exhibit 2, p. 36)

Mr. Murphy stated that the parties were informed they could submit closing briefs in writing. (Exhibit 2, p. 36) The letter continues:

> "Neither party asked for more trial time. Nevertheless, if Ms. Huddle had requested more time to present evidence then that request would have been considered. The allegation that Ms. Huddle was prevented from calling certain witnesses was not brought to the attention of the Court. If such a concern had been raised, then Judge McBrien would have certainly considered a request by either side for more trial time." (Exhibit 2, p. 36)

As to the request for Mr. Carlsson's Statement of Economic Interest, Mr. Murphy stated that Judge McBrien asked for the documents because "it was likely" the forms would contain Mr. Carlsson's opinion about "the value of the rental property and the amount of income from the rental property." (Exhibit 2, p. 37) As for the discussion of contempt, Mr. Murphy stated that Judge McBrien only raised the "'possibility'" of contempt. (Exhibit 2, p. 37)

> "Nevertheless, Judge McBrien regrets mentioning even the 'possibility' of contempt to Ms. Huddle under the circumstances and believes that he became momentarily and inappropriately frustrated with Ms. Huddle's misapplication of the Fifth Amendment." (Exhibit 2, p. 37)

As to Judge McBrien's request for the transcript of Mr. Carlsson's testimony about Mr. Minkoff, Mr. Murphy stated that Judge McBrien asked his clerk to ask the court report to prepare the transcript, but Judge McBrien did not instruct anyone to keep that information from the parties, attorneys, or anyone else. Mr. Murphy stated that Judge McBrien faxed the transcript to Ms. Cabatic on September 11, 2006, because he was concerned "there was at least the possibility of a conflict of interest resulting from Mr. Carlsson's relationship with the silent partner in Southern California and that Mr. Carlsson had not disclosed this relationship," which would be a misdemeanor under the FPPA. (Exhibit 2, pp. 37-38)

> "Judge McBrien reasonably felt he had an obligation to report the issue to General Services under the circumstances. However, he did not suggest to General Services what the transcript reflected or his impressions of the transcript. The transcript of the proceedings and Mr. Carlsson's Statement of Economic Interests (which Judge McBrien has never seen) speak for themselves. General Services was free to reach its own conclusions and it did so without input or guidance from Judge McBrien." (Exhibit 2, p. 38)

Mr. Murphy stated that Judge McBrien learned about the adverse action taken against Mr. Carlsson "[s]ome time later," and disqualified himself from the Carlsson case on November 7, 2006. (Exhibit 2, p. 38) Mr. Murphy's letter concluded:

"In retrospect, Judge McBrien believes that he should have recused himself on September 11, 2006, after faxing the transcript to General Services." (Exhibit 2, p. 38)[24]

Judge McBrien's letter to the Commission

On August 8, 2008, Judge McBrien sent a letter to the Commission addressing the allegations which had been raised regarding the *Carlsson* trial. (Exhibit 3) The letter was not written by his attorney or sent on the attorney's letterhead. Instead, Judge McBrien testified he wrote the letter himself, to share his "insight" about the *Carlsson* trial. (HT 154, Exhibit 3, p. 71)

Judge McBrien began his letter by addressing the Third District's reversal of his ruling in *Carlsson*:

"I understand and respect the opinion of the Third District Court of Appeal in *Carlsson* regardless of what the California Supreme Court does with the case. The insights I share here were not before that Court, nor would they have necessarily influenced their opinion. Though unusual, I ask that someone on the Commission read the trial transcript to see if agreement with those conclusions are appropriate for your very different scope of responsibility."

Judge McBrien next addressed Ms. Huddle's practice in family law cases:

"The reputation and experience of the family law bar with Ms. Huddle has almost always involved cases which far exceed declared and expected time frames. (I have served as a Judge in family law in Sacramento since 1990). *Thus my constant reminder to her was my effort to avoid a very lengthy trial, to the disadvantage of those waiting next.* I certainly understand on its face how it could appear that I was badgering her in an improper manner. At the return from the lunch recess on the first day, I offered suggestions on how to be able to complete the matter within the time available. (RT 149).

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[24] As explained *ante*, in his deposition, Judge McBrien explained this statement was in his response to the Commission "because, by that time, I had known that adverse action had been taken. It wasn't until I heard that adverse action was taken against Mr. Carlsson and then, once I heard that, I disqualified myself." (Exhibit 5, p. 52)

> "*The case started to deteriorate during the late afternoon of the first day when Mr. Carlsson testified regarding his purchase of a 4-plex with none of his money down and 100% of the down payment from a state contractor with whom he did business through his employment with General Services.* (RT 222) Why Ms. Huddle raised this whole line of questioning is still unknown to me. This is why I raised the issue of the Statement of Economic Interest and whether Mr. Carlsson had included this transaction." (Exhibit 3, pp. 71-72, italics added)

Judge McBrien wrote that he had been employed by the state, in one capacity or another, for over 35 years, and he was familiar with the need to disclose certain information in the financial statements. (Exhibit 3, p. 72)

> "Then when it became ever so apparent that no disclosure nor any concern regarding this matter rested with Mr. Carlsson or his attorney, *I was faced, to my mind, with the disclosure of possible criminal activity or at least with a conflict of interest.*
>
> "In my years as a judge I have never before faced this. It has long been said that in family law, you have basically good people, acting at their worst. Generally they do not become involved or even admit to possible criminal behavior.
>
> "*I admit I acted badly and for which actions I deserve to be rebuked.* It would be helpful, however, if some guidance were to come from this lesson rather than just punishment." (Exhibit 3, p. 72, italics added)

Judge McBrien also addressed the merits of his ruling against Mr. Carlsson, and stated the record refuted any claim his ruling was "'one-sided,'" and he properly ordered the sale of the properties, denied Mr. Carlsson's motion for no spousal support, and Mr. Carlsson failed to prove that a third person had an interest in the fourplex. (Exhibit 3, p.72)

At the hearing, Judge McBrien was asked about the passage in his letter, where he stated that he deserved to be rebuked for acting badly, and he testified about what he meant. (HT 183)

> "As important as the substance of a ruling or procedure, is sometimes the perception. And I believe in this case, *I was remiss in not protecting the*

record, given the Court of Appeal's sufficient information to where they could understand what I was doing, that any members of the public that were present also wouldn't have an idea of what was going on. I believe, though, that the attorneys and their clients, should they have discussed it with them, would know exactly what was happening." (HT 183, italics added)

Also at the hearing, Judge McBrien testified that in his letter to the Commission, where he wrote that he deserved to be rebuked, he meant that an informal letter would be an appropriate resolution to the disciplinary allegations of misconduct arising out of the *Carlsson* trial. (HT 183-184) Judge McBrien testified his alleged misconduct was "not keeping in mind the need to appear to the public that I completed everything according to, possibly, the public's perception of how things should happen as opposed to the way in which Sacramento's family law system is structured." (HT 184)

"Q. So are you saying the only thing you feel you did wrong in this whole case is to leave a record that is misleading?

"A. Incomplete.

"Q. Incomplete. You did nothing else wrong?

"A. I don't believe that I did." (HT 184)

PART VII
PRIOR IMPOSITION OF DISCIPLINE

We now turn to the prior imposition of discipline against Judge McBrien, which was a public admonishment in 2002. At the hearing, the Commission introduced evidence of the public admonishment (exhibit 4). For reasons that are not clear, Judge McBrien felt compelled to testify extensively about the matter. After the hearing, the Commission requested to introduce additional exhibits regarding the underlying facts of the prior disciplinary matter to refute Judge McBrien's hearing testimony on the matter. Judge McBrien stipulated to the admission of the Commission's exhibits, and submitted a

statement to clarify his hearing testimony. (See 5/4/09 Request by Commission and Stipulation.)

Public Admonishment

On April 25, 2002, the Commission publicly admonished Judge McBrien based on his no contest plea to a misdemeanor violation of Penal Code section 384a, the willful or negligent cutting or mutilation of any tree growing upon public land or the land of another without permission. (Exhibit 4) The public admonishment stated:

> "Judge McBrien's criminal conviction arose out of the 1999 *cutting of trees, and removal of limbs from trees*, on public land adjacent to his residence. The trees were growing in a nature center located in a public park owned by the County of Sacramento. The trees included mature oaks, and were cut for the purpose of improving the view of a nearby river from the McBrien residence. The trees were cut without the permission of the County of Sacramento." (Exhibit 4, italics added)

According to the public admonishment, Judge McBrien was placed on probation, ordered to pay $20,000 in restitution to Sacramento County, and to pay a $500 fine.[25] He complied with the terms of probation, probation was terminated, and his subsequent petition pursuant to Penal Code section 1203.4 was granted. (Exhibit 4)

The public admonishment stated:

> "Judge McBrien's conduct evidenced disregard of the principles of personal and official conduct embodied in the California Code of Judicial Ethics, including failure to observe high standards of conduct so that the integrity and independence of the judiciary will be preserved (canon 1), and failure to respect and comply with the law and to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary (canon 2), and constituted conduct prejudicial to the administration of justice that brings the judicial office into disrepute. (California Constitution, Article VI, section 18(d).)" (Exhibit 4)

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[25] On October 27, 2000, Judge McBrien pleaded no contest in Sacramento County Superior Court to one misdemeanor violation of Penal Code section 384a. (Exhibit 45, p. 4541; Exhibit 45, RT 10/27/00, p. 9)

According to the public admonishment, Judge McBrien's conduct "was the subject of numerous news articles, including in the *Sacramento Bee* and *Sacramento News & Review*." (Exhibit 4) Judge McBrien wrote to the Commission: "'I sincerely regret my misdemeanor violation of the law, primarily because it brings dishonor and disrespect to the bench.'" (Exhibit 4)

Hearing evidence about the public admonishment

On the last day of the hearing, Judge McBrien was on the stand and his attorney, Mr. Murphy, asked him about the public admonishment for cutting trees on public property. Special Master Cornell interrupted and said the public admonishment had been introduced as an exhibit and spoke for itself. (HT 580) The following exchange occurred:

> "MR. MURPHY: But I want an explanation of what he actually did and show that it's not related to his judicial duties. It's mitigation. I don't think the judge has had an opportunity to explain.
>
> "[JUDGE MCBRIEN]: I've never spoken in public regarding it.
>
> "SPECIAL MASTER CORNELL: Go ahead.
>
> "[JUDGE MCBRIEN]: And I was hopeful that the Bee would be here, but they aren't.
>
> "MR. MURPHY: Okay.
>
> "SPECIAL MASTER CORNELL: Why were you hopeful that the Bee—the Bee is the local newspaper.
>
> "[JUDGE MCBRIEN]: Because they're the ones—and the various news media have not ever spoken to me, but I haven't also spoken to them. Everyone assumes that I'm the Paul Bunyan of Sacramento. *In fact, it involved one limb on one tree.* And at the time that the tree was cut—by an arborist, not me personally—I did not know that it was against the law. There exists a Sacramento County Parks and Rec code provision that makes it a misdemeanor to cut any Oak tree in Sacramento County, whether it be on private or public land, without a permit." (HT 580-518, italics added)

Judge McBrien testified he thought the Commission's public admonishment was appropriate because he pleaded no contest to a misdemeanor, but the incident was unrelated to any of his judicial duties. (HT 581) "[A]t the full monthly judges' meeting, I apologized to my fellow jurists for the embarrassment that I had brought to them, and gave them some examples of how they could avoid the same calamity in the future." (HT 581)

Judge McBrien testified there was some question whether the tree limb was on his property, where his backyard sloped down to a 75-foot cliff, and a river was below the cliff. (HT 582, 609) The tree trunk was in the "crotch" of the land. (HT 582) He testified that a fire district official had informed him, about six months prior to the tree incident, that the particular limb from that tree posed a fire threat. (HT 582) "It was not cut for viewing purposes." (HT 582) He hired an arborist to cut the limb, but later discovered that Sacramento County ordinances prohibited any cutting of oak trees, even on private property. (HT 582)

On cross-examination by the Commission, Judge McBrien testified that a hearing was not held on the prior disciplinary matter, and the public admonishment was an agreed-upon disposition. (HT 606)

"Q. So did you agree to the language in the admonishment?

"A. No. I don't know that I had the language, but possibly my attorney did.

"Q. Well, if your attorney had it, wouldn't you have looked at it as well?

"A. Presumably." (HT 607)

Judge McBrien testified the underlying basis for the initial felony charge was his violation of a county ordinance about cutting trees.[26] He admitted the public

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[26] On October 26, 2000, Judge McBrien was charged by information with a felony violation of Penal Code section 594, subdivision (a), the unlawful and malicious damage

admonishment was based on his conviction for violating Penal Code section 384, subdivision (a), and not for violating a county ordinance. (HT 607)

"[Q.] The trees in question were on public land?

"A. That was in dispute, but certainly not worth going to trial regarding.

"Q. But it's now a part of the Statement of Facts [in the public admonishment]?

"A. I understand that. I'm not disputing what the Commission did. [¶] All I was trying to do was explain the underlying circumstances that actually existed." (HT 608)

Judge McBrien was asked about the factual statement in the public admonishment, that his conviction was based on cutting of trees and removal of limbs on public land. (HT 608-609)

"Q. Is it accurate?

"A. Is it accurate? *There was one tree involved,* and there was a fence—downed fence between the tree and the river.

"Q. You had the tree and/or limb, if you wish to call it a limb, removed for what purpose?

"A. From my perspective, it was to enhance the fire safety of our residence and the residence next to us." (HT 609, italics added)

Judge McBrien testified only one limb was removed: "It was a lengthy one. I mean—I mean, it was probably 20 or 30 feet long." (HT 609)

"Q. The trees that were cut included mature Oaks. Is that true?

"A. *The limb that was cut by me involved a mature Oak.*

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and destruction of real and personal property, oak trees, not belonging to him, and belonging to the Sacramento County Department of Parks and Recreation. (Exhibit 45, p. 4530) On the same day, he pleaded no contest to a misdemeanor. There is no reference in the information or plea proceedings to any county ordinances.

"Q. It says 'trees,' not 'limb.'

"A. I understand what it says.

"Q. And you agreed to this language.

"A. I did not dispute it.

"Q. Why would you agree to it if you believed it to be untrue.

"A. The language of the actual charge was presented to me on the morning of the [no contest] plea, and I accepted it.

"Q. Are you saying you didn't have adequate time to review it and ask for changes to make the document true?

"A. I'm just saying—explaining what—what, in fact, happened." (HT 610, italics added)

Judge McBrien testified he did not dispute the language in the public admonishment, but "I'm telling you what happened," and he agreed to the public admonishment "[p]robably to avoid a hearing." (HT 611)

"Q. You were ordered to pay $20,000 in restitution?

"A. Correct.

"Q. For one branch?

"A. Correct—no. *It was a limb*. It was measured, apparently, by so many dollars per inch. And as I indicated, it was a lengthy limb." (HT 611, italics added)

Judge McBrien was asked about the statement in the public admonishment that the trees were cut for the purpose of improving the view of a nearby river from his house.

"[Q.] Is that the reason the trees, or limb, were cut?

"A. That is what that statement says.

"Q. I asked you if that's the real reason?

"A. *That's the real reason in that it was a side benefit, but it wasn't the reason we did it.*" (HT 612, italics added)

Judge McBrien further testified he wanted to explain what happened in the tree incident because he had been "vilified" by the Sacramento News and Review, which called him "Chainsaw McBrien" and still portrayed him "as the Paul Bunyan of Sacramento." (HT 613)

Judge McBrien's sworn statement to the Commmission

In response to his hearing testimony, the Commission introduced another exhibit in this matter, consisting of Judge McBrien's sworn statement to the Commission during the investigation about the charges related to the tree-trimming incident. (See 5/4/09 Commission Request.) Judge McBrien gave the sworn statement in August 2001, after he pleaded no contest to the misdemeanor violation. (Exhibit 46)

In his sworn statement, Judge McBrien said his house and backyard were on a flat parcel, the backyard was not fenced, and the backyard extended to the edge of a steep bluff that sloped down to the American River. (Exhibit 46, Sworn Statement at pp. 24-31)

He returned home from work on a day in 1999, and saw the tree trimmer "pruning" an oak tree on the downhill slope from his backyard. (Exhibit 46, pp. 57-58, 62-63, 120-121) He watched for about 10 or 15 seconds, and saw the tree trimmer "take a chain saw and cut the tree," and he saw "some part of a tree come off of that tree that he was pruning." (*Id.* at pp. 63-64, 65, bold omitted.)

> "Q At some point did you gain an understanding as to why [the tree trimmer] was working on that tree, the one that you saw him working on the first day in 1999?
>
> "A Yes.
>
> "Q What was that understanding?
>
> "A That he was cutting it to improve the view.
>
> "Q Okay. And from whom did you obtain that understanding?

"A I don't specifically recall. I would—if I had to guess, I would imagine my wife." (Exhibit 46, p. 66, bold omitted.)

Judge McBrien had no recollection of discussing the work with the tree trimmer, directing the work, helping the trimmer with his equipment or lowering him down the slope, or speaking with his family about the trimmer's work. (Exhibit 46, pp. 58-60, 63-64, 68-69) When Judge McBrien saw the trimmer working, he was not concerned that the tree might not be on his property. (*Id.* at p. 72.) He believed the trimmer was working on a limb that was about six feet long. (*Id.* at p. 74.)

Judge McBrien testified he again saw the tree trimmer at his house, most likely on the very next day. He believed the trimmer returned to work on a hanging limb, and he saw the trimmer in different oak tree. (Exhibit 46, p. 58, 75-76, 94-96) After the trimmer came down from the tree, Judge McBrien heard a loud noise and the limb fell. (*Id.* at pp. 77-78.) Judge McBrien did not recollect running into his house as the limb made noise and fell, and he could not say whether such a description of his was correct or incorrect. (*Id.* at pp. 98-100.) He did not speak, communicate, or assist the trimmer that day. (*Id.* at pp. 80, 87-88.)

Judge McBrien testified he later learned the trimmer worked on more than two trees, he did not know the exact number, and he believed the number was similar to that reflected in a search warrant affidavit. (Exhibit 46, pp. 90-92.) He disputed the allegation that he directed or assisted the trimmer's work, and testified his wife hired the trimmer and directed his work. (*Id.* at pp. 97-98, 122.)

"Q Okay. And so your present understanding is five mature trees and three small trees, as described in the search warrant affidavit?

"A That's the basis for my understanding." (Exhibit 46, p. 92, bold omitted.)

Judge McBrien was asked if he and/or his wife spoke to their neighbors, the Arthurs, about the investigation into the tree trimming, and whether he told them not to

speak with the investigators, or that they should answer questions with more questions. Judge McBrien testified he had no recollection that either he or his wife made such statements. He denied making those statements, and stated that it would have been out of character for him to do that. (Exhibit 46, pp. 103-106, 123-124)

Judge McBrien and the tree trimmer were charged with a felony arising out of the incident, and they both pleaded to a misdemeanor. Judge McBrien testified he paid the $500 fine levied on the tree trimmer and apologized to him for the resulting distress from the incident. (Exhibit 46, pp. 108-109) During the plea proceedings, the tree trimmer told Judge McBrien that he cut about three or four branches. (*Id.* at p. 120.)

Judge McBrien testified that at some point in 1997, 1998, or 1999, a fire district official indicated the trees on the slope to the river provided an enhanced fire danger, but that official did not make any recommendations. (Exhibit 46, pp. 111-112) His understanding "today" was that the work was done on the trees to reduce fire danger. (*Id.* at pp. 112-113.)

At the conclusion of his sworn statement, Judge McBrien's attorney introduced mitigating evidence. Judge McBrien became involved in various projects on his own initiative. (Exhibit 46, p. 127) The projects included working in a soup kitchen on a weekly basis, joining the board of directors of the Sacramento Tree Foundation, and serving on the board of a coalition that provides housing to the disabled and disadvantaged. (*Id.* at pp. 125-128.) Judge McBrien had apologized at a judges meeting for any embarrassment his situation may have caused. His apology was accepted and he received the support of the bench. His attorney stated these actions were all expressions of Judge McBrien's remorse and deep contrition, and to show his rehabilitation. (*Id.* at pp. 127-128.)

Judge McBrien's attorney further stated:

"[T]his is a very serious proceeding. There's no question about it. And the problem is, when people's livelihood is on the line, I think that you should be able to show as much positive aspects of somebody, especially Judge McBrien here, who has gone out—he's not been prodded. He got into the soup kitchen right after the search warrant was filed [in the tree case]. And these are things he said he wants to do. He wants to make amends, and I think that's quite good." (Exhibit 46, pp. 129-130)

Judge McBrien's post-hearing statement

In response to his hearing testimony about the prior disciplinary matter, and the Commission's introduction of his prior sworn statement, Judge McBrien submitted the following statement to the Special Masters after the hearing:

"Judge McBrien's [hearing] testimony regarding the arborist's trimming of oak trees *related to his own personal observation and not to the extent of the tree trimming activity that was the subject of the misdemeanor charge. Judge McBrien observed only one large limb cut from the oak tree in question and apologizes if there was any confusion regarding this testimony. Judge McBrien acknowledges that the limb he observed being removed was not the only cutting done by the arborist.* The point Judge McBrien was attempting to make by way of his testimony was that it did not make any difference whether the oak tree was on private or public land; the prohibitory ordinance made any cutting without a permit a misdemeanor. *While view enhancement was an intended effect of the trimming, the testimony of Judge McBrien on April 3, 2009 was true and correct to his best recollection.*" (Exhibit P, italics added)

PART VIII
CHARACTER EVIDENCE

At the hearing, Judge McBrien called numerous witnesses to testify to his good character and judicial demeanor.

Judge James Mize, the presiding judge of the Sacramento Superior Court, often appeared before Judge McBrien in the family law division before his own appointment to the bench in 2000. Judge Mize testified that when he appeared as an attorney in family law cases, Judge McBrien was fair, impartial, courteous, dignified, and patient, and Judge Mize considered him an asset to the family law bench. As a family law practitioner,

Judge Mize felt Judge McBrien brought great benefits to the family law division because he was willing to stay in the division, and he provided continuity and experience in dealing with family law cases. (HT 432-437)

After Judge Mize's appointment, he served in the family law division with Judge McBrien, who willingly answered his questions and provided assistance in his early days on the bench. Judge Mize considered Judge McBrien to be a mentor and the bench's family law expert, because he had been there the longest and handled all types of cases. (HT 439-441) As the presiding judge, Judge Mize described Judge McBrien as "one of the judges that you are delighted to have . . . because you don't hear anything. You don't get any complaints. You just get the job done, and . . . you're not constantly cleaning up messes." (HT 443)

Judge Mize testified Judge McBrien was a great asset and invaluable to the family law bench and the superior court. (HT 441, 443-444) Judge Mize testified Judge McBrien's reputation among the local bar was consistent with his own beliefs: "He was consistent. He was predictable. And you knew that if you had him, you weren't going to expect something outrageous or unusual. You would get an appropriate ruling. Whether it was in your favor or not, was not necessarily always the case; but at least you would have gotten a ruling that was within the bounds of what you would have expected." (HT 444)

Judge Thomas Cecil was retired but he was sitting by assignment in the family law division, and he was the division's supervising judge in 2008. Judge Cecil lacked prior family law experience, and testified that Judge McBrien helped him with his duties when he joined the family law division. Judge Cecil spent some time in Judge McBrien's courtroom before he started to hear his own cases. Judge McBrien was "always there before anybody else" because of the hours he kept, and had an open-door policy to discuss general or complicated issues. (HT 450-451)

Judge Robert Hight of the Sacramento County Superior Court testified he was assigned to the family law division in 2006. He did not have any experience in family law and Judge McBrien served as his mentor. (HT 455-456) Judge Hight and another new judge began their family law assignment by sitting in Judge McBrien's courtroom and watching him, and he was impressed with Judge McBrien's patience and understanding of the issues. (HT 457) Judge Hight testified that Judge McBrien was patient and dignified, acted warm and hospitable to parties, and his demeanor broke the tension often present in family law cases. (HT 457) He was particularly courteous to parties who were representing themselves and he helped them through their arguments. (HT 457-458) Judge Hight testified he "never observed anything other than courtesy to all attorneys and pro pers." (HT 458)

Judge Hight testified that when he started to hear family law cases, "every day, I would go in and ask [Judge McBrien] some question; and he either [gave] me an instant answer or would say, you know, 'I just read a recent Appellate Court case on that,' and he had a big stack behind his desk of Appellate Court cases just related to family law, and he would go through them and pull out of the middle this recent case and say, 'This is exactly on point.'" (HT 456) Judge McBrien was presiding judge for a period of time, and had the ability to organize the division: "I mean, it's a back-breaking job because you'll have 20 cases in the morning, easily, and another 20 in the afternoon; and it's just—it's just a tough job." (HT 458)

Judge Michael Garcia of the Sacramento County Superior Court met Judge McBrien in 1981, when they served in the Attorney General's Office. Judge Garcia testified Judge McBrien was helpful and they enjoyed a good professional relationship when they worked together. (HT 535-536) On the bench, Judge Garcia testified that Judge McBrien "wanted to be in family law, and that was unique at the time. Family law was not a sought-out assignment by many judges," but he enjoyed the assignment. (HT

539) Judge McBrien was instrumental in changing and improving the family law division's procedures. (HT 538-539)

Judge Garcia was presiding judge in 2002 and 2003, when Judge McBrien continued to serve in the family law division. (HT 534) Judge Garcia testified Judge McBrien had a very good judicial temperament, he was inquisitive, and he made rulings based on the law and not on what he might want to do. (HT 536-537) "Judge McBrien is not that type of judge. He knows the law well. He researches the law." (HT 537)

Judge Garcia appointed Judge McBrien as supervisor of the family law division because Judge McBrien had great "people" and organizational skills, and "he had a lot of respect from the family law bar at that time because he had worked in family law." (HT 537) Judge McBrien also provided continuity in the family law division, which was important for the court and the family law bar. (HT 537-538)

Judge Garcia testified Judge McBrien was an asset to the bench because he respected the family law bar and the mental health professionals, he still displayed intellectual curiosity, he kept up with the law and made very good decisions, and his "people skills" were very positive. (HT 539-540)

Presiding Justice Arthur Scotland of the Court of Appeal, Third Appellate District, was a native of Sacramento. He had known Judge McBrien for 32 years, and they served together in the Attorney General's office and the Office of the Governor. (HT 548-550) Justice Scotland testified there had been 110 appeals to the Third District from Judge McBrien's cases, and seven cases had been reversed. (HT 549, 551-552) Justice Scotland testified that one of the seven reversals was the *Carlsson* case; two other cases were reversed in full, and the other four were reversed in part, such that Judge McBrien's reversal rate was six percent, "a remarkably good reversal rate." (HT 552-553) Justice Scotland testified the Third District's average reversal rate in civil cases was 20 to 25 percent. (HT 553)

Justice Scotland testified he contacted family law specialists in the area and asked them about Judge McBrien's reputation. He determined from those conversations that Judge McBrien had an excellent reputation as a dedicated family law judge. He was very knowledgeable, thorough, and careful, he had a great ability to understand sophisticated and complicated issues related to the division and valuation of property, and attorneys were pleased to be assigned to him because he was able to grasp the more difficult issues. (HT 553-554)

Justice Scotland testified that Judge McBrien's reputation was that he applied the law without any bias, and he would change his mind if convinced it was the appropriate thing to do. (HT 554-555)

> "All of [the family law attorneys] commented that he—you have to understand the family law court in Sacramento County. You have so many cases and you have such limited time. And to be honest with you, one of the things I would struggle with as a family law judge is to let attorneys/parties present their case for as long as you can; but at a certain point, you just have to—you have to move on. You can't spend hours and hours on every single case.
>
> "And Judge McBrien—a number of [attorneys] mentioned that he didn't—he doesn't let attorneys waste time. And that he could, from time to time, perhaps, appear abrupt. Maybe that's the wrong word, but ... he would not allow attorneys to waste time. If attorneys did not understand the law or were unprepared, then he would—he would call them on it, so to speak. They didn't use that word; I'm using that word....
>
> "But, in other words, he wouldn't allow people just to go on and on. He would expect attorneys to be prepared." (HT 555)

Justice Scotland testified that Judge McBrien had a reputation for being very calm, thorough, open, always dignified, fair, and not biased in any way, "but expecting that people do the job well. And if you don't do the job well, you know, responding appropriately. In fact, several of the attorneys said any time that they ever saw him perhaps being short with an attorney, it was a pro per." (HT 556, 557) "What I heard is:

If you're a good, prepared family law attorney, you want to be in his court. If you're unprepared and you're not a good family law attorney, you may not necessarily want to be in his court." (HT 556) Justice Scotland testified that Judge McBrien did not act inappropriately, even if an attorney was not prepared. (HT 557)

Justice Scotland testified Judge McBrien was an asset to the family law bench, and it would be a great blow to family law practitioners and the bench if he left the division for any reason. Justice Scotland greatly respected Judge McBrien for voluntarily staying in the family law division because it was a tough assignment and involved very contentious proceedings with difficult issues. (HT 558-560)

Jerry Guthrie testified he practiced family law for 25 years, and had regularly appeared before Judge McBrien in family law cases since Judge McBrien's assignment to that department. Judge McBrien was courteous to litigants and attorneys, patient, and judicially dignified. Judge McBrien's demeanor was "what I would expect of a judge." (HT 514-516) Judge McBrien had ruled against Mr. Guthrie but he had always been fair. (HT 515)

Russell Carlson, an attorney for 13 years, testified his practice was about 80 percent family law, and he was a member of the Family Law Section of the Sacramento County Bar Association. He also served voluntarily as a pro tem judge in the family law division. (HT 518-519) He had tried cases and argued law and motion matters before Judge McBrien. He testified that Judge McBrien was courteous to litigants and attorneys, patient, and dignified. Judge McBrien was always fair, even when Mr. Carlson did not agree with his rulings. (HT 520)

Judge McBrien was "[a]bsolutely" an asset to the family law bench. "He's been the mainstay throughout my career in family law. . . . So if I have cases where I have questions on how to judge my role, this is who I will go to, Judge McBrien, to ask those

questions. When I'm pro temming, if I have particular problems or need to bring litigants or attorneys down, this is the judge I'll bring them to." (HT 521)

Robert O'Hair testified he had practiced family law since 1981 or 1982. He was a certified family law specialist, a member of the Sacramento County Bar Association's Family Law Section, and he served on that section's executive committee. (HT 583-586) He worked with Judge McBrien in that capacity on methods to streamline family law cases and improve the local rules. (HT 586-588) Mr. O'Hair testified Judge McBrien was dedicated to the improvement of family law in Sacramento County, and he was "one of the more active judges" in that area compared to other members of the bench. (HT 588)

Mr. O'Hair conducted four or five trials before Judge McBrien, and "[s]ome of my biggest defeats have probably come from Judge McBrien." (HT 588, 589) Mr. O'Hair, however, considered Judge McBrien an asset to the family law bench, and described him as fair, patient, courteous to litigants and attorneys, hard working, and knowledgeable about the law. (HT 588-589)

Camille Hemmer testified she had exclusively practiced family law in Sacramento since 1985, and she was a certified family law specialist. (HT 591) She was a member of the Sacramento County Bar Association, and held every post in that organization. She also served on the Family Law Section's executive committee. She briefly represented Mr. Carlsson in his dissolution. (HT 592-593)

Ms. Hemmer regularly appeared before Judge McBrien. She tried five or six cases and argued about 40 law and motion matters before him, and worked with him on the Family Law Section's Executive Committee. (HT 593-594) She testified Judge McBrien was patient, courteous to litigants and attorneys, and an asset to the superior court bench. He was a good judge and she would continue to accept trial assignments before him. (HT 594-595)

Thomas Russell, a licensed clinical social worker, testified he worked with the Sacramento County Superior Court's family law division, to provide private mediation services and serve as a special master for high-conflict cases. (HT 597) He had testified as an expert witness before Judge McBrien about 40 to 50 times. (HT 598, 599) Mr. Russell testified Judge McBrien was very patient, fair, impartial, and dignified, and always been extremely courteous when he testified in his courtroom. (HT 598-599) He was absolutely impressed by Judge McBrien's performance in his judicial duties. (HT 599)

CONCLUSIONS OF LAW

COUNT I(A)(1)

The notice of formal proceedings charged as follows: On March 9, 2006, Judge McBrien abandoned and terminated the *Carlsson* trial, in the middle of Mr. Carlsson's case-in-chief, without giving Mr. Carlsson the opportunity to complete the presentation of evidence or offer rebuttal evidence, which resulted in the denial of Mr. Carlsson's constitutional rights to due process and a fair trial.

We conclude Judge McBrien violated canons 2A and 3B(7) by abandoning and terminating the trial in the middle of Mr. Carlsson's case-in-chief, and in the middle of a witness's testimony. He did not take the case under submission, allow the parties to make oral closing arguments, or inform the parties whether they could file post-trial documentary evidence or closing briefs. We further conclude Judge McBrien violated Mr. Carlsson's constitutional right to due process and a fair trial because he did not allow Mr. Carlsson to be heard, complete the presentation of evidence in his case-in-chief, or provide the opportunity to present rebuttal evidence. These actions caused the Third District Court of Appeal to reverse Judge McBrien's ruling in a published decision.

Judge McBrien's conduct was prompted by his receipt of the EPO call. Judge McBrien's typical practice when he received an EPO call while on the bench was

immediately to call a recess, step out of the courtroom, speak to the caller (the county operator and/or a law enforcement officer), and deal with the telephonic request. Judge McBrien typically returned to the bench after he completed the EPO call, explained what just happened to the attorneys and parties, and resumed the proceedings that were interrupted by the call.

Canon 2(A) requires a judge to act at all times in a manner that promotes public confidence in the integrity of the judiciary. Canon 3(B)(7) requires a judge to accord every person, or that person's lawyer, the full right to be heard according to the law. Judge McBrien violated these canons when he instantly and inappropriately terminated the Carlsson trial upon receiving the EPO call at 4:28 p.m. on March 9, 2006, while a witness was on the stand and testifying. Judge McBrien did so prior to addressing or even determining the exact nature of the EPO call, or the length of time it would take to address the particular telephonic request.

The EPO call was completed in less than three minutes. The parties, the attorneys, the testifying witness, court personnel, and the public remained in the courtroom, in the reasonable expectation that Judge McBrien would return to the courtroom or otherwise inform them of the situation. He called his residence at 4:35 p.m. Judge McBrien then left the courthouse while all the interested parties were still waiting for him to return to the courtroom, and without determining, either personally or through his clerk, whether the parties were still present. (Exhibit 15, p. 169.3; HT 104-105)

Judge McBrien repeatedly declared on the afternoon of March 9, 2006, that the *Carlsson* trial would end at 4:30 p.m. or there would be a mistrial. He received the EPO call at 4:28 p.m., and he immediately declared the trial was over, left the bench, and never returned. Judge McBrien was obliged to return to the courtroom after he completed the extremely brief EPO call, explain if (and why) he was going to excuse the testifying witness, advise the parties as to whether they would have the opportunity to

submit additional evidence and file closing briefs, and take the case under submission. Instead, he suddenly and precipitously declared the trial was over even before he determined the nature of the EPO request, and acted in a way that was contrary to his usual practice in such a situation. The entirety of the record demonstrates that Judge McBrien was preoccupied with efficiency at the expense of ensuring a party's constitutional right to be heard.

We note that aside from the incident with the final witness, Judge McBrien never prevented a witness from testifying and never cut off a witness's testimony. Based upon the undisputed time notations in the minute orders, Judge McBrien provided the parties with more trial time in the courtroom than a normal two-day court calendar would have allowed.

The Commission's Notice of Formal Proceedings alleged Judge McBrien entered judgment in favor of Mrs. Carlsson "on almost every issue." (10/25/08 Notice at p. 2.) The Third District's opinion stated that as to the substantive rulings in the Carlsson dissolution, Judge McBrien's termination of the trial rendered an assessment of prejudice impossible because the appellate court could not speculate "on what evidence would have been submitted had [Mr. Carlsson] been permitted to complete his presentation, much less determine whether it would have made a difference in the judgment. [Citation.]" (*In re Marriage of Carlsson*, *supra*, 163 Cal.App.4th at p. 294.)

At oral argument, counsel for the Commission asserted Judge McBrien should have returned to the bench to conclude the trial and allowed Mr. Carlsson the opportunity to be heard and introduce additional evidence. Counsel for the Commission, however, conceded it would have been within Judge McBrian's discretion if he briefly returned to the bench, entertained offers of proof, excluded the bulk of the remaining evidence as cumulative, allowed the parties to submit the remaining issues in writing, took the matter under submission, and then adjourned. (AT 11-12, 19-21, 52)

We conclude Judge McBrien's rulings and decisions in the dissolution case did not reflect any bias or prejudice against either Mr. Carlsson or Ms. Huddle, particularly as to the spousal support order, the division of property, and the order to sell both the residence and the fourplex, all of which were supported by the weight of the evidence. While reasonable minds might differ as to the award of attorney fees, we cannot say that any aspect of Judge McBrien's decision was so unreasonable as to reflect any bias or prejudice against Mr. Carlsson or Ms. Huddle.

We further note that Ms. Huddle was presented with numerous opportunities to pursue options to submit additional evidence or request more time, but she repeatedly failed to take full advantage of those opportunities. Immediately after Judge McBrien left the bench on March 9, 2006, Ms. Keeley verbally advised Ms. Huddle that they could confer and request another trial date ("We'll arrange another date. Don't panic."). (RT 463) In addition, Ms. Keeley and Ms. Huddle exchanged several post-trial letters, in which Ms. Keeley offered several suggestions as to how they could submit additional evidence to Judge McBrien on the contested dissolution issues. Ms. Huddle did not accept or discuss any of Ms. Keeley's proposals to introduce additional evidence pursuant to a stipulation or settled statement. Instead, Ms. Huddle responded with a settlement offer, which included the provision that Mrs. Carlsson would not receive any spousal support.

While Ms. Huddle's closing brief complained about the manner in which the trial ended, she failed to pursue any of the avenues presented to her to introduce additional evidence in the dissolution case, or attempt to reach any agreement with Ms. Keeley to file stipulations or a settled statement that would have resolved any evidentiary concerns, particularly since Ms. Keeley was willing to waive cross-examination on such issues. Ms. Huddle's failure to pursue these reasonable options was indicative of her overall conduct during the *Carlsson* case. Judge McBrien was presented with an attorney who

was not prepared for trial. Ms. Huddle filed a late settlement conference statement, she did not conduct a pretrial meet-and-confer with her opponent to mark exhibits, and she did not file a trial brief. Ms. Huddle rebuffed Ms. Keeley's repeated offers, made during and after the presentation of testimony, to pursue options to submit additional evidence or request more time.

Trial judges frequently are confronted with attorneys who are not well prepared and who do not perform well. The conduct of trial judges is governed by the canons, not the actions of attorneys. At oral argument in this matter, Judge McBrien's counsel conceded that Judge McBrien's conduct in leaving the bench and declaring the trial was over, "[u]nder the circumstances, given the appellate decision, . . . would probably amount to" prejudicial conduct. (AT 53)

We conclude that McBrien's conduct was intemperate and precipitous when he terminated and abandoned the trial as he did. He violated Mr. Carlsson's constitutional rights to due process and a fair trial, and his actions constituted conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

COUNT I(A)(2)

The notice of formal proceedings charged as follows: During the *Carlsson* trial, Judge McBrien made a sua sponte request for Mr. Carlsson to produce his Statements of Economic Interests filed as part of his employment at the state's DGS, which were not relevant to the pending dissolution matter. Judge McBrien advised Mr. Carlsson to consult an attorney regarding his exposure to potential penalties beyond the dissolution action, and threatened Mr. Carlsson's attorney, Ms. Huddle, with contempt if Mr. Carlsson asserted his Fifth Amendment rights and declined to produce the documents.

We conclude Judge McBrien made a *sua sponte* request during trial for the production of Mr. Carlsson's Statements of Economic Interests, and those documents were not relevant to the pending dissolution matter. We further conclude Judge McBrien

violated canons 2 and 3B(4) during his lengthy exchange with Ms. Huddle on March 9, 2006. An attorney would perceive the language and tone used by Judge McBrien as threatening contempt if the attorney failed to comply with his request for the production of the document, and such conduct constituted improper action.

At the close of testimony on March 3, 2006, Judge McBrien requested Mr. Carlsson to produce his Statements of Economic Interests at the next trial day. When the trial resumed on the afternoon of March 9, 2006, Judge McBrien immediately asked Mr. Carlsson if he complied with his request and obtained the documents, and Ms. Huddle said no. A lengthy exchange ensued between Judge McBrien and Ms. Huddle, during which Ms. Huddle repeatedly argued that Judge McBrien did not order Mr. Carlsson to produce the documents and the documents were not relevant. Judge McBrien agreed the documents were not relevant, but asked if she wanted the record read, and responded to her stated refusal to produce the document by asking: "[A]m I to take that as a 'no' placing you in the possibility of contempt?" (RT 370)

Judge McBrien agreed that he could not have found either Mr. Carlsson or Ms. Huddle in contempt because he "requested" and did not order the production of the documents, but he admitted that his "request" to produce the documents became "stronger and stronger" as his exchange with Ms. Huddle continued, at which point "the possibility of contempt becomes an option." (HT 141, 143-144) Nevertheless, Judge McBrien acknowledged that he never issued an order that could have supported a finding of contempt as to either Mr. Carlsson or Ms. Huddle.

Canon 2 states a judge shall avoid impropriety and the appearance of impropriety in all activities. Canon 3(B)(4) states a judge shall be patient, dignified, and courteous to all parties with whom the judge deals in an official capacity. While the threats of contempt may have been empty, Judge McBrien violated these canons because his statements during this exchange would have been perceived as threatening contempt.

We further conclude that Judge McBrien did not threaten to find either Mr. Carlsson or Ms. Huddle in contempt for the potential assertion of a Fifth Amendment right. Mr. Carlsson testified at trial that he filed yearly Statements of Economic Interests with his employer, and Judge McBrien requested Mr. Carlsson to produce those documents for the years that Mr. Minkoff had an interest in the fourplex. The documents were not produced. During the lengthy exchange on March 9, 2006, Ms. Huddle attempted to raise a Fifth Amendment objection against production of the Statements of Economic Interests. Once a Statement of Economic Interest is filed, however, it is a public document that must be made available to the public upon request. (Gov. Code, § 81008, subd. (a).) Ms. Huddle failed to perceive that she could not assert a Fifth Amendment privilege to prevent disclosure of documents that were a matter of public record.[27]

Judge McBrien admittedly became frustrated with Ms. Huddle's inability to perceive the distinction. While Judge McBrien may have been frustrated with Ms. Huddle, he did not raise the possibility of contempt in response to her attempt to claim the Fifth Amendment privilege against production of Mr. Carlsson's Statements of Economic Interests. We conclude that Judge McBrien's conduct constituted improper action.

COUNT I(A)(3)

The notice of formal proceedings charged as follows: Shortly after the end of the *Carlsson* trial, Judge McBrien ordered his courtroom clerk to ask the court reporter to prepare a partial transcript of certain proceedings regarding Mr. Carlsson's real estate ownership and Statements of Economic Interests, his clerk instructed the court reporter

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[27] The record strongly implies that Mr. Carlsson's employer, DGS, similarly failed to realize the document was public record, because it refused to provide the document to Mr. Mayo when he tried to retrieve it.

not to tell anyone about the request, he sent the transcript to Mr. Carlsson's employer, DGS, notified DGS that Mr. Carlsson failed to disclose certain information, and Mr. Carlsson was removed from his job. Judge McBrien failed to notify the parties about his actions and continued to preside over the dissolution matter.

We conclude Judge McBrien violated canons 2 and 3(E)(2) by becoming embroiled in the action. Judge McBrien (1) ordered his courtroom clerk to ask the court reporter to prepare a partial transcript of Mr. Carlsson's testimony, (2) made two additional requests for that transcript when it was not transmitted to him, (3) subsequently sent the transcript to Mr. Carlsson's employer and stated that the transcript involved a reporting matter, (4) failed to notify the parties about his actions, and (5) continued to preside over post-trial motions in the Carlsson case. All of these actions constituted conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

As a family law judge of nearly 20 years, Judge McBrien admittedly had faced situations where parties have given sworn testimony about their financial affairs contrary to their state and federal income tax returns, which were executed under penalty of perjury and introduced as exhibits in family law proceedings. Judge McBrien had never reported a party for the possible commission of a crime, even when presented with contradictory testimony that raised the possibility that a party committed a felony in the execution of state and/or federal tax returns or in testifying before him. Judge McBrien explained that when he was presented with conflicts between a party's testimony and tax returns, he usually accepted the tax returns as truly reflective of the party's financial condition. This approach is in sharp contrast to what Judge McBrien did here.

Judge McBrien testified that his request and transmission of the transcript of Mr. Carlsson's testimony to DGS was based upon his belief that he had a duty to report Mr. Carlsson's possible commission of a crime. Mr. Carlsson testified he may not have

disclosed his business relationship in the fourplex with Mr. Minkoff in his Statements of Economic Interests, and that nondisclosure may have violated the Fair Political Practices Act (FPPA).

While Judge McBrien may have believed he had a duty to report Mr. Carlsson's testimony because it raised the possibility that he committed a crime, we conclude that Judge McBrien's conduct went far beyond the consideration of whether he had such a duty in this case, and that Judge McBrien engaged in an investigation during the course of the trial and post-trial period, as to whether Mr. Carlsson's conduct violated the FPPA.

Mr. Carlsson testified on direct and cross-examination about his business and working relationship with Mr. Minkoff, Mr. Minkoff's loan to purchase and rebuild the fourlex, that he worked with Mr. Minkoff in his capacity with DGS, and his uncertainty as to whether he disclosed their joint ownership of the fourplex in documents that he was required to file as a state employee pursuant to the FPPA. After the completion of his testimony, however, Judge McBrien independently questioned Mr. Carlsson and asked if the documents were known as Statements of Economic Interests, filed with the Secretary of State's office, and Mr. Carlsson was not sure. Thereafter, Judge McBrien made a sua sponte request for Mr. Carlsson to produce his Statements of Economic Interests by the next trial day, and suggested that Mr. Carlsson consult with an attorney about his possible failure to comply with the FPPA because of "potential penalties far beyond what we're talking about today." (RT 363) While Ms. Keeley suggested that Mr. Carlsson should produce documents for particular years, the request to produce the document originated with Judge McBrien. When Mr. Carlsson failed to produce the documents, Ms. Keeley did not lodge any objections but, as we have explained, Judge McBrien raised the possibility of contempt with Ms. Huddle.

Judge McBrien offered several explanations as to why he requested Mr. Carlsson to produce his Statements of Economic Interests. They were: (1) he was not sure what he

heard; (2) Mr. Carlsson might have violated the FPPA if he failed to disclose Mr. Minkoff's interest in the fourplex, but it would not have been an issue if Mr. Carlsson had disclosed the matter; (3) Mr. Carlsson's nondisclosure might have constituted a violation of law, and Mr. Carlsson needed to speak to another attorney because Ms. Huddle did not have any idea of what they were talking about; (4) the Fair Political Practices Commission (FPPC) might have placed a lien or confiscated the fourplex as a penalty for nondisclosure, which would have prevented the division and disposition of property in the dissolution action; and, (5) the documents would have been relevant to the dissolution trial if Mr. Carlsson disclosed his ownership of the fourplex because the documents would have contained Mr. Carlsson's opinions as to the fourplex's fair market value and annual rental income.

During the course of the hearing, however, Judge McBrien conceded he was familiar with Statements of Economic Interests based upon his own lengthy government employment, and that the documents he requested Mr. Carlsson to produce would not have contained any valuation or income information. Judge McBrien also admitted he had never heard that the FPPC had the power to place a lien or confiscate property as a penalty for nondisclosure.

Mr. Carlsson never produced his Statements of Economic Interests. Judge McBrien's investigation in this matter, however, continued after the conclusion of the *Carlsson* trial. Judge McBrien asked his courtroom clerk to contact the court reporter and request a transcript of Mr. Carlsson's cross-examination testimony. This request was made either on March 3, 2006, the day of Mr. Carlsson's testimony, or March 9, 2006, the last day of trial. The court reporter complied with the request on March 10, 2006, the day after the trial ended.

It is undisputed that Judge McBrien did not receive the transcript after the March 2006 request, and he issued the statement of decision in the dissolution trial without the

benefit of either the Statements of Economic Interests or the transcript of Mr. Carlsson's testimony. Judge McBrien thus ruled upon the case without these documents, which refutes his assertion that he needed the documents, or that he believed nondisclosure might have interfered with the disposition of the fourplex, which he ordered to be sold.

Judge McBrien continued to investigate this matter. A second request was made for the transcript, based upon a minute order filed on May 12, 2006, signed by both Judge McBrien and his courtroom clerk. The court reporter sent the transcript to Judge McBrien's chambers but he still did not receive it at that time.

A third request was made for the transcript in September 2006. By that time, Judge McBrien had heard and ruled upon Mrs. Carlsson's post-trial motions in July and August 2006, to compel Mr. Carlsson to comply with Judge McBrien's earlier rulings to sell the residence and fourplex. In making the third request, Judge McBrien's courtroom clerk instructed the court reporter to email the transcript directly to the clerk's email address. The court reporter complied and Judge McBrien finally received the transcript of Mr. Carlsson's cross-examination testimony about his relationship with Mr. Minkoff.

When Judge McBrien finally received the transcript, he read Mr. Carlsson's testimony and was concerned that Mr. Carlsson violated FPPC rules by failing to disclose his business relationship with Mr. Minkoff in his Statements of Economic Interests. Judge McBrien believed a judge had an obligation to report any potential violation of law, and that he had been considering what to do in the intervening period between his first request for transcript in March 2006, and his receipt of the transcript in September 2006. (HT 167-168) Judge McBrien had been discussing the matter with Judges Hight and Sumner throughout this time. They concluded that the transcript should be sent to DGS, Mr. Carlsson's employer, rather than the FPPC, because no one knew anyone at the FPPC, but one of the judges knew Linda Cabatic was DGS's general counsel. (HT 165-167, 168-171, 254-255)

On September 11, 2006, Judge McBrien faxed the transcript to Ms. Cabatic, DGS's general counsel and someone with whom he had a passing recognition from his past state service. Judge McBrien called Ms. Cabatic, and informed her that he was sending something regarding a reporting matter. (Exhibit 5, p. 49)

Judge McBrien did not advise the parties and the attorneys about his actions. He continued to hear and rule upon Mrs. Carlsson's post-trial motions to compel Mr. Carlsson's compliance with the court's prior orders. He did not recuse himself from the case until November 2006, when he learned DGS took disciplinary action against Mr. Carlsson.

Judge McBrien argues he had a duty to report Mr. Carlsson to his employer because his possible failure to disclose his business relationship in the fourplex with Mr. Minkoff in his Statements of Economic Interests could have been a misdemeanor. (Respondent's Proposed Findings of Fact and Conclusions of Law, p. 24)

Judge McBrien is correct that Mr. Carlsson's testimony implicated a possible violation of law. The conflict of interest provisions of the Political Reform Act (PRA) require certain state officials and employees to file Statements of Economic Interests, which disclose investments, interests in real property, and income. (Gov. Code, §§ 87200-87210, 87500.) Moreover, the PRA provides that no public official at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest. (Gov. Code, § 87100.) A public official has a financial interest in a decision within the meaning of Government Code section 87100 if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official, a member of the official's family, or on a business entity or real property in which the public official has a financial interest worth more than $2000. (Gov. Code, § 87103.)

Any person who knowingly or willfully violates any provision of the PRA is guilty of a misdemeanor, and may be ordered to pay a fine of up to $10,000, or three times the amount that was not properly reported, upon conviction for each violation. (Gov. Code, § 91000, subds. (a) & (b).) The FPPC, however, does not conduct criminal investigations or prosecutions for violations of the PRA. Instead, the Attorney General is responsible for enforcing the criminal provisions with respect to state agencies, lobbyists, and state elections, and the district attorney of the county in which the violation occurs has concurrent powers and responsibilities with the Attorney General. (Gov. Code, § 91001, subd. (a).) In addition, any person who violates a provision of the PRA is subject to discipline by his or her agency, including dismissal, consistent with any applicable civil service or other personnel laws. (Gov. Code, § 91003.5.)

We agree that a judge is in "a special position" to observe potential criminal conduct in the courtroom, whether it consists of a witness's perjury or revelations of crime emerging from the evidence. (Rothman, Cal. Judicial Conduct Handbook, *supra*, § 5.68, p. 252.) "The obligation of a judge to report a crime that takes place in the courtroom is the same as that of an ordinary citizen, *unless the judge is the only person who has knowledge of the criminal conduct.*" (Rothman, Cal. Judicial Conduct Handbook, *supra*, § 5.68, p. 253, bold omitted, italics added.) Such situations frequently arise in family law cases:

> "Perjury and tax fraud (especially in family law cases) are two crimes that can be revealed in the course of court proceedings. *In such cases, the lawyers and parties, as well as the courtroom visitors, clerks, court reporters, and bailiffs are all not only aware of what is taking place, but are also in a position to report it.* In such circumstances, some judges believe that they should report the criminal conduct, whereas others do not, … " (Rothman, Cal. Judicial Conduct Handbook, *supra*, § 5.68, p. 253.)

A judge does not necessarily have a duty greater than an ordinary citizen to report a crime unless the judge is the only person aware of the criminal act. (Rothman, Cal. Judicial Conduct Handbook, *supra*, § 5.68, p. 253.)

> "Judges are not expected to bear the additional burden of trying to figure out whether or not the judge is the only person 'in a position' to report the criminal conduct, or whether law enforcement is aware of a particular 'significant' violation of law. If that were the rule, a judge would have a far greater duty than an ordinary citizen. *If, however, the judge is the only person aware of the circumstances, then the judge should act.* [¶] *This sort of event is not common, however, in the ordinary courtroom context, where the parties, lawyers and many other people have the necessary information to report and the interest in doing so. Under these circumstances the judge is not required to do anything.*" (Rothman, Cal. Judicial Conduct Handbook, *supra*, § 5.68, pp. 253-254, italics added.)

While a judge may not have an ethical obligation to report a crime in certain circumstances, it is not improper for the judge to do so. (Rothman, Cal. Judicial Conduct Handbook, *supra*, § 5.68, p. 254.)

> "The courts cannot prevent parties to a dissolution from lying to each other. But, when they lie to the court they do so under penalty of perjury subjecting themselves to criminal prosecution. A trial court is not required to refer such cases to the district attorney or the Internal Revenue Service and Franchise Tax Board when it believes a crime has been committed. But, it should not be faulted for doing so. [Citation.]" (*In re Marriage of Calcaterra and Badakhsh* (2005) 132 Cal.App.4th 28, 38.)

If the judge does report the crime, he or she must avoid "becoming an advocate" in the process of making the report. (Rothman, Cal. Judicial Conduct Handbook, *supra*, § 5.68, p. 254.) "If a trial court, in the exercise of its discretion, elects to report a crime to an appropriate agency, it should not become an advocate. It should simply make the referral and let the agency exercise its powers whether or not to go forward." (*In re Marriage of Calcaterra and Badakhsh*, *supra*, 132 Cal.App.4th at p. 38; Rothman, Cal. Judicial Conduct Handbook, *supra*, § 5.68, p. 254.) More importantly, however, if the judge reports the criminal act, the judge must inform the parties that such a report has

been made. (Rothman, Cal. Judicial Conduct Handbook (Apr. 2008 supp.) 2006/2007 Judicial Ethics Update, § I.C.2, p. 2.)

Canon 2 states that a judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities. Judge McBrien's investigating whether Mr. Carlsson violated the FPPA, repeatedly requesting the transcript of Mr. Carlsson's testimony, and transmitting that transcript to Mr. Carlsson's employer, constituted judicial embroilment.

> "Embroilment is the process by which *the judge surrenders the role of impartial factfinder/decisionmaker, and joins the fray*. This can manifest itself in improper ex parte communications out of a need to 'expedite' the case, acceding to improper procedures under an intense need to move the calendar, attempting to see to it that a certain result prevails out of a misguided perception of the judicial role, abusing the power to impose contempt and other sanctions out of a perception by the judge that his or her power is being challenged, or simple loss of self-control." (Rothman, Cal. Judicial Conduct Handbook, *supra*, § 2.01, p. 37, italics added; see also *Offutt v. United States* (1954) 348 U.S. 11, 17 ["[I]nstead of representing the impersonal authority of law, the trial judge permitted himself to become personally embroiled with the petitioner"].)

Judge McBrien did not simply learn of a possible violation of law by presiding over the *Carlsson* trial, he "joined the fray" through his investigation and lengthy pursuit of the issue. Also, Judge McBrien did not report Mr. Carlsson's testimony to the appropriate agency, which would have been the Attorney General or the District Attorney, but instead sent the transcript to the general counsel for Mr. Carlsson's employer.

Canon 3(E)(2) states that a judge shall disclose on the record information that is reasonably relevant to the question of disqualification, even if the judge believes there is no actual basis for disqualification. A judge may be required to recuse himself from a pending case when the judge has become so "'personally embroiled'" as to make him "unfit" to conduct further proceedings. (*Mayberry v. Pennsylvania* (1971) 400 U.S. 455, 465; see also *In re Martin* (1977) 71 Cal.App.3d 472, 480; *In re Wagner* (2005) 127

Cal.App.4th 138, 147-148; *Wenger v. Commission* (1981) 29 Cal.3d 615, 642-643, disapproved on another point in *Doan*, *supra*, 11 Cal.4th at pp. 319, 325.)

Judge McBrien failed to inform the parties and the attorneys that he had reported Mr. Carlsson's possible criminal violation to his employer, and he continued to preside over post-trial motions in the *Carlsson* case. It was not until adverse action was taken against Mr. Carlsson that Judge McBrien recused himself. (Exhibit 5, pp. 51-52)

We further conclude that Judge McBrien's conduct did not constitute willful misconduct because he did not engage in unjudicial conduct committed in bad faith, while acting in a judicial capacity. (*Dodds, supra,* 12 Cal.4th at p. 172; *Broadman*, *supra*, 18 Cal.4th at p. 1091.) "[I]n determining whether a judge's conduct is 'unjudicial,' we measure that conduct with reference to the California Code of Judicial Conduct. [Citations.]" (*Dodds*, *supra*, 12 Cal.4th at p. 172.) "A judge acts in bad faith only by (1) performing a judicial act for a corrupt purpose (which is any purpose other than the faithful discharge of judicial duties), or (2) performing a judicial act with knowledge that the act is beyond the judge's lawful judicial power, or (3) performing a judicial act that exceeds the judge's lawful power with a conscious disregard for the limits of the judge's authority." (*Broadman*, *supra*, 18 Cal.4th at p. 1092.)

At oral argument, counsel for the Commission argued Judge McBrien's actions as alleged in count I(A)(3) constituted prejudicial misconduct at a minimum. Counsel for the Commission, however, conceded Judge McBrien's actions did not constitute willful misconduct if the Special Masters found his conduct was not indicative of bad faith, and counsel declined to argue that Judge McBrien's failure to consult with the California Judge's Association constituted bad faith or raised his actions to willful misconduct. (AT 36-38) Also at oral argument, Judge McBrien's counsel conceded Judge McBrien was "probably . . . involved" in improper action for failing to disclose his actions to the parties. (AT 70)

We conclude that Judge McBrien believed, in good faith, that he had the duty, as a judicial officer, to report a possible violation of law. He consulted with two judges as to his duties and responsibilities. His actions, while inappropriate and in violation of the canons, did not involve bad faith or rise to willful misconduct, but amounted to conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

COUNT I(A)(4)

The notice of formal proceedings charged as follows: During the *Carlsson* trial, Judge McBrien displayed impatience with Ms. Huddle, repeatedly threatened a mistrial if the proceedings were not concluded quickly enough, and addressed Ms. Huddle in a discourteous and derogatory manner.

We conclude Judge McBrien violated canons 2 and 3B(4) by (1) being discourteous to Ms. Huddle, (2) repeatedly threatening a mistrial when she questioned a witness or objected to testimony, (3) and addressing her in a derogatory manner while she was examining a witness. We further conclude such conduct constituted improper action.

It is undisputed that Judge McBrien works very hard in a high-volume court. The family law division constantly is pressured for time, and the system that Judge McBrien helped devise functions only if the attorneys comply with their time estimates for trial. The system was revised to enable family law trials to be conducted by judges in the family law division in an expeditious manner, and to avoid placing family law cases on the master trial calendar where they would compete for courtrooms with other criminal and civil trials.

As we have noted, Ms. Huddle was not as prepared for trial as her counterpart, Ms. Keeley. This affected the presentation of Mr. Carlsson's case.

Canon 2 states that a judge shall avoid impropriety and the appearance of impropriety in all activities. Canon 3(B)(4) states a judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in

an official capacity. Judge McBrien violated these canons through his derogatory and discourteous remarks toward Ms. Huddle.

This conduct began almost immediately upon the commencement of the *Carlsson* trial. Ms. Huddle did not engage in any conduct to trigger or provoke Judge McBrien's comments. Judge McBrien admitted his remarks toward Ms. Huddle were based upon his history with her. Judge McBrien testified he had several prior cases with Ms. Huddle, and his experience was that she never completed her cases within the time estimates. Ms. Huddle also admitted she had a history with Judge McBrien. He declared a mistrial in one of her prior cases, and she had filed oral and written motions to disqualify Judge McBrien from hearing other cases. She made an unsuccessful oral motion to disqualify Judge McBrien within minutes of learning the *Carlsson* trial was assigned to him, although there is no evidence that Judge McBrien was aware of the motion.

During the course of the trial, Judge McBrien repeatedly stated that he would declare a mistrial if the parties failed to complete the trial within the two-day estimate. While Ms. Keeley testified that he tried to keep both parties moving, we find that Judge McBrien's mistrial threats were exclusively directed at Ms. Huddle, and were triggered by such conduct as questioning witnesses, asking for breaks when the trial went through the lunch hour, making objections, or discussing evidentiary issues.

Judge McBrien's first threat of a mistrial was made when Ms. Huddle asked for a break on the first morning of trial. (RT 136-138) Shortly after Ms. Huddle began Mr. Carlsson's case-in-chief, on the afternoon of the first trial day, Judge McBrien admonished her to "move along," and reminded her that she had "a limited period of time" to present her evidence. (RT 220, 222) On the second morning of trial, Ms. Huddle tried to explain that Mr. Minkoff could not appear because of a serious illness. Judge McBrien responded by asking whether "this is a slow motion for a Mistrial." (RT 262) As Mr. Huddle continued with Mr. Carlsson's case-in-chief, she paused to

introduce several exhibits and Judge McBrien again admonished that her time was "waning." (RT 314) He never directed such remarks to Ms. Keeley or raised the threat of a mistrial while she questioned a witness, made an objection, or introduced an exhibit.

Judge McBrien testified that he did not mean it when he repeatedly threatened to declare a mistrial. Judge McBrien testified he merely used the threat of a mistrial, and other comments about the limited time available to the parties, to keep the trial moving because of his prior experience with Ms. Huddle. Judge McBrien, however, repeatedly and unambiguously informed Ms. Huddle that he would declare a mistrial if she failed to complete the case within a day and a half, even though the attorneys provided him with a trial estimate of two days. Judge McBrien ultimately relented and agreed to conduct the trial for another half-day, to comport with the parties' two-day estimate.[28]

During the last afternoon of trial, however, Judge McBrien's immediate response to Ms. Huddle's request for a break was to threaten a mistrial. When she asked to recall Mr. Carlsson's appraiser to respond to Ms. Keeley's evidence about the appraiser's mathematical error, Judge McBrien agreed but again admonished her to call the witness "while you still have time." (RT 461) Judge McBrien did not threaten a mistrial in response to Ms. Keeley's request to recall Mrs. Carlsson's appraiser, or when Ms. Keeley cross-examined Mr. Carlsson's appraiser about the mathematical error.

Judge McBrien made additional derogatory and discourteous remarks to Ms. Huddle independent of his mistrial threats. He admonished her not to think out loud as she hesitated to conduct redirect examination of a witness. When Mr. Minkoff finally was able to appear on the final afternoon of trial, Ms. Huddle attempted to make a record as to the seriousness of his illness and weakened physical condition. Judge McBrien

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[28] As we have noted *ante*, the parties received more than two days of actual courtroom time based upon the timings in the minute orders.

again admonished her to move on, and said "[t]his is not a law school class" and she did not have to explain her motives. (RT 373-374) Ms. Huddle testified that Judge McBrien used a demeaning voice when he made this comment, as if she was being scolded in front of her client and the public in the courtroom. Judge McBrien testified he was just trying to give her an example of what she needed to do, but admitted that someone could have perceived his comment as demeaning. Again, Judge McBrien never directed such comments to Ms. Keeley during the trial.

We find all of Judge McBrien's discourteous comments to Ms. Huddle were made in open court in the presence of her client and the public.

In his briefing before the Special Masters, Judge McBrien suggested that Ms. Huddle was trying to get a mistrial declared, based upon her unsuccessful attempt to obtain a continuance on the day before the trial. (Respondent's Proposed Findings of Fact and Conclusions of law, p. 11.) We find there is no evidence to support this suggestion.

Judge McBrien also suggests that Ms. Huddle's strategy was to obtain a mistrial because she retained an appellate attorney to prepare various pre- and post-trial motions in the Carlsson case. We find this suggestion puzzling since a mistrial would have foreclosed an appeal. We also note it is not uncommon for attorneys to retain an appellate attorney during the course of trial to prepare for the inevitable appellate proceedings.

We also reject the Commission's assertion that Judge McBrien and Ms. Keeley engaged in an ex parte conversation in the courtroom, during a break in the testimony, allegedly about Ms. Huddle's lack of competence. We find this allegation not proven.

We conclude that Judge McBrien's statements toward Ms. Huddle violated canons 2 and 3(B)(4) and constituted improper action. As we have already explained, however, we conclude that Judge McBrien's rulings and decisions in the dissolution case did not

reflect any bias or prejudice against either Mr. Carlsson or Ms. Huddle. Aside from the incident on the last afternoon of trial, Judge McBrien never prevented a witness from testifying and never cut off a witness's testimony. While Judge McBrien improperly and inappropriately terminated the trial, Ms. Huddle failed to pursue other opportunities to introduce evidence through a settled statement or stipulation, and her failure to do so was based upon her own decisions and not on Judge McBrien's conduct.

FACTORS IN AGGRAVATION

1. Judge McBrien lacked insight as to the impropriety of continuing to preside over the *Carlsson* matter after sending the transcript of Mr. Carlsson's testimony to his employer and not notifying the parties.

2. Judge McBrien continues to lack insight into how his actions in the *Carlsson* matter would be perceived by the public.

3. Judge McBrien has a prior public admonishment.

4. At the Special Masters' hearing, Judge McBrien gave testimony inconsistent with his prior sworn statement regarding the underlying matter of his prior public admonishment.

5. Judge McBrien improperly tried to use the Special Masters' hearing as a public forum to address a grievance with the media on a prior disciplinary matter.

FACTORS IN MITIGATION

1. Judge McBrien is extremely hard working, keeps long hours, willingly works through lunch hours, and takes short breaks to make sure parties get their trial time.

2. Judge McBrien voluntarily stayed in the family law division for nearly 20 years.

3. Judge McBrien played an active role in revising the family law system to allow trials to be heard expeditiously by experienced family law judges.

4. Judge McBrien had a good faith belief in his duty to report a possible criminal violation.

5. Judge McBrien consulted with judicial colleagues as to the appropriate steps to take to report a possible criminal violation.

6. The disciplinary action taken against Mr. Carlsson by his employer was based upon his own misconduct, and not influenced by Judge McBrien.

7. Judge McBrien admitted in a personal letter to the Commission: "I admit I acted badly and for which actions I deserve to be rebuked." (Exhibit 3, p. 72)

8. Judge McBrien apologized to his judicial colleagues for his prior public admonishment.

9. Judge McBrien voluntarily performed public service, unrelated to any condition of a criminal plea, upon the filing of criminal charges in the underlying matter that resulted in the prior public admonishment.

10. Judge McBrien has served as a mentor to new judges in the family law division.

11. Judge McBrien has continued to work with the family law bar to improve the trial system in family law division.

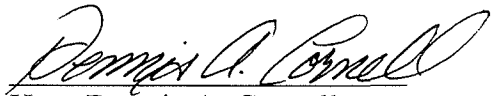
12. In over 40,000 contested hearings, this is the only instance of Judge McBrien's misconduct on the bench.

13. Judge McBrien is widely respected by attorneys who frequently appear in front of him, and judges who serve with him.

14. Judge McBrien has a very low reversal rate on appeal considering the nature of his lengthy assignment in the family law division.

15. Numerous character witnesses testified favorably about Judge McBrien's judicial demeanor.

Respectfully submitted,



Hon. Dennis A. Cornell
Presiding Special Master

Hon. Denise deBellefeuille
Special Master

CONCURRENCE AND DISSENT

I concur in part and dissent in part in the findings and conclusions contained within the report of the Special Masters.

The Commission on Judicial Performance has charged Judge McBrien with a single count, separated into four "sub-counts", of violating the Code of Judicial Ethics. All of the charges pertain to Judge McBrien's conduct in connection with the family law trial, referred to as the Carlsson trial, and more fully described in the report of Special Masters.

It appears beyond dispute that Judge McBrien acted improperly in at least some respects in conducting the trial. Indeed, as stated in the report of the Special Masters, "Judge McBrien's counsel conceded that Judge McBrien's conduct in leaving the bench and declaring the trial was over, "[u]nder the circumstances, given the appellate decision, . . . would probably amount to" prejudicial conduct. (AT 53)." As further stated in the report of the Special Masters, "at oral argument, Judge McBrien's counsel conceded Judge McBrien was "probably . . . involved" in improper action for failing to disclose his actions to the parties. (AT 70)". In light of these concessions, and in light of the evidence presented, I join my colleagues in finding that Judge McBrien violated the Code of Judicial Ethics in the manner in which he terminated the Carlsson trial, and in contacting Mr. Carlsson's employer while the matter was still pending. I find that the Examiner has not met his burden of proving the other allegations by clear and convincing evidence.

The salient facts are as follows. In family law proceedings in Sacramento Superior Court, the parties are responsible for giving accurate time estimates for trial. The trial for the Carlsson matter was estimated by both sides to be two days, and the dates were set by the agreement of the attorneys. Although Ms. Huddle, who represented Respondent, agreed to the dates set for trial, it appears from the record that she did not want to go to

trial on those dates, and did not want to try the case in front of Judge McBrien. Ms. Huddle was able to obtain the agreement of Ms. Keeley, who represented Petitioner, to continue the original trial date in January 2006 to the March 2 and March 3 2006 dates. However, she was unable to convince Ms. Keeley at the February 15,2006 settlement conference to again continue the trial date. She did not file a Motion to Continue, but instead unsuccessfully brought an ex parte motion to continue the trial the day before trial. On the date set for trial, Judge Cecil assigned the matter to Judge McBrien. Ms. Huddle brought an oral motion to recuse Judge McBrien, which was denied by Judge Cecil. The matter then proceeded to trial before Judge McBrien.

Throughout the trial, Judge McBrien warned Ms. Huddle of the possibility of a mistrial when he believed she was acting in disregard of the time estimate by asking irrelevant questions and offering what he believed to be unnecessary commentary. He mentioned the possibility of a mistrial in an effort to prompt her to move things along. Ultimately, the trial lasted the equivalent of two days before ending abruptly as described below.

The trial consumed a full court day, March 2, and a half court day on March 3. Judge McBrien had encouraged the attorneys to try to complete the case by noon on March 3 because he was engaged in a continuing trial with statutory priority that was coming back the afternoon of March 3. When it was clear that the Carlsson trial would not be completed by noon on March 3, Judge McBrien agreed to set aside the afternoon of March 9. Judge McBrien had previously offered to work through the noon hour if necessary to accommodate the schedule of a witness. During the trial on March 9 Judge McBrien indicated that he was unable to go past 4:30. Shortly after 2:00 Judge McBrien said that if the matter did not conclude by 4:30 there would be a mistrial. The trial ended abruptly after the approximate equivalent of two court days on March 9, 2006 just before 4:30, when Judge McBrien left the bench in order to handle an emergency telephonic

request from law enforcement for a domestic violence restraining order. As he was leaving the courtroom Judge McBrien announced that the county operator was on the phone and "this trial has ended." The call from the county operator lasted one minute, followed immediately by a call at 4:29 p.m. which Judge McBrien believes was from law enforcement, lasting less than two minutes.

Judge McBrien did not return that afternoon to the courtroom to further address the parties and counsel, instead, apparently making a call to his home and then leaving the courthouse. The parties and counsel remained for 10-15 minutes. Judge McBrien testified that he believed they were not waiting for him, but were gathering their books and likely meeting and conferring on how to go forward. The following day Judge McBrien instructed his clerk to notify counsel that they could submit their closing arguments in writing, and briefs on attorney fees. The post trial proceedings are described in the report of the Special Masters.

Judge McBrien, through his counsel, concedes he committed prejudicial misconduct by ending the trial in this manner, in light of the published appellate decision.

I agree with the finding that as to count I(A)(1), Judge McBrien violated the Code of Judicial Ethics, canons 2A and 3(B)(7), and committed conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

As to count I(A)(2), I find that the Examiner has not proven by clear and convincing evidence that Judge McBrien's comments and requests constituted "threats" of contempt or other conduct in violation of canons 2 and 3B(4).

As to count I(A)(3), I join in part with the findings of the Special Masters, as follows. During the trial Judge McBrien heard testimony from Respondent which he believed may have constituted a crime or a violation of the Fair Political Practices Act. Judge McBrien obtained and reviewed the transcript of the testimony, and after discussing the matter with two other judges he concluded that he had the obligation to

report the conduct. Rather than reporting the matter to law enforcement or the FPPC, or asking his staff to transmit the information, Judge McBrien telephoned the general counsel of Respondent's employer to advise that he was faxing to her "something about reporting." Judge McBrien faxed the transcript to her. Judge McBrien did not advise the parties and attorneys about his actions, even though post-trial motions were pending. Judge McBrien did not recuse himself until he learned, in November 2006, that disciplinary action had been taken against Respondent by his employer. Ultimately, administrative hearings ensued, and Respondent was terminated by his employer.

Based on these facts, I find Judge McBrien violated canons 2 and 3E(2), and committed an improper action.

As to count I(A)(4), I find that the Examiner has not proven by clear and convincing evidence that Judge McBrien violated canons 2 and 3B(4). As to this count and as to the others, I find that the balance of credibility favors witness Charlotte Keeley's testimony.

Finally, I concur in the findings of the Special Masters as to the Factors in Aggravation and Factors in Mitigation.

Respectfully submitted,

Hon. Gail Andler
Special Master